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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 174.

CHARLES FOX, PLAINTIFF IN ERROR,

vs.

THE CITY OF CINCINNATI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED APRIL 12, 1879.

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1 The United States of America to the city of Cincinnati, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Ohio, wherein Charles Fox is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Noah H. Swayne, associate justice of the Supreme Court of the United States, this 21st day of March, in the year of our Lord one thousand eight hundred and seventy-nine.

N. H. SWAYNE,
Asso. Jus. Sup't Court U. S.

2 On this 31st day of March, in the year of our Lord one thousand eight hundred and seventy-nine, personally appeared Charles H. Fox before me, the subscriber, a notary public, and makes oath that he delivered a true copy of the within citation to R. M. Moore, mayor of the city of Cincinnati, defendant in error.

CHARLES H. FOX.

Sworn to and subscribed the 31st day of March, A. D. 1879.

[SEAL.] N. BIRD,
Notary Public, Hamilton Co., Ohio.

Received copy of the within writ, Cincinnati, March 31st, 1879.

R. M. MOORE,
Mayor.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Ohio, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Charles Fox, plaintiff in error, and the city of Cincinnati, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of
4 the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the

record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-first day of March, in the year of our Lord one thousand eight hundred and seventy-nine.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

N. H. SWAYNE,
Asso. Jus. Sup. Court U. S.

5 THE STATE OF OHIO,
City of Columbus, ss:

To the honorable Supreme Court of the United States:

Pursuant to the command of your within writ of error directed to us, we, under our seal, distinctly and openly, the record and proceedings within mentioned, with all things concerning the same, before the judges within named in a certain authenticated transcript to this writ attached, do send as within we are commanded.

In witness whereof I, Richard J. Fanning, clerk of the supreme court of the State of Ohio, have set my hand and the seal of said court this fifth day of April, A. D. 1879.

[SEAL.] RICHARD J. FANNING,
Clerk.

6 CHARLES FOX
vs.
THE CITY OF CINCINNATI.

To the honorable Noah H. Swayne, a justice of the Supreme Court of the United States:

Your petitioner, Charles Fox, a citizen of the United States and of the State of Ohio, residing in said State, to your honor respectfully represents and sets forth that at the January term, 1874, of the court of common pleas of Hamilton County, in the State of Ohio, in a case wherein this petitioner was plaintiff and the city of Cincinnati was defendant a judgment was rendered against your petitioner for the costs in said cause. That your petitioner on the 29th day of May, 1874, filed a petition in error in the district court of said Hamilton County, and attached to said petition a transcript and abstract of the docket
7 and journal entries and original papers in said cause in the court of common pleas of Hamilton County, as required by law, and prayed the said district court for errors assigned in said petition to reverse said judgment of the court of common pleas. That the said suit in error came up for decision in the said district court of Hamilton County at the October term of said district court, in the year 1874, and the said district court then and there considered the questions involved in the cause as important and difficult, on the motion of this petitioner,

ordered that the cause be reserved and sent to the supreme court of Ohio for its decision.

And your petitioner further states that the cause was immediately transferred to the said supreme court of Ohio, and was continued in said court until the term of December, 1878, where the cause was argued by counsel, when said court ordered and adjudged that the
8 judgment of said court of common pleas be affirmed at the costs of this petitioner.

And petitioner further states that Clark Williams, and this petitioner, as his assignee, claimed that the State of Ohio, on the 26th day of March, in the year 1836, leased to said Clark Williams for ninety-nine years, and to be renewable forever, the use of all the water power owned by the State of Ohio at the locks on the Miami and Erie Canal, within the corporated limits of Cincinnati, being all the surplus water which may at any time pass said locks not required to pass boats and other floats.

Petitioner further claimed the city of Cincinnati, under a pretended power conferred by an act passed on the 24th day of March, 1863, passed by the legislature of Ohio, entitled an act to authorize the city of Cincinnati to enter upon and occupy, improve and occupy forever as a public highway, and for sewerage purposes, all or any part of the
9 Miami and Erie Canal, which extends from the eastern side of Broadway in said city to the Ohio River, including the width thereof as held by the State of Ohio, by which grant it was claimed by said city that she had power to prevent the surplus water issuing from lock No. 7 to lock No. 8 on the canal to flow to and be used by the petitioner, then the owner of the use of said surplus water at lock No. 8, and which the said city of Cincinnati did prevent the plaintiff, who by said lease to Clark Williams, and by assignment to petitioner had the right to use the water flowing to lock No. 8 from lock No. 7, from using said surplus water at lock No. 8 without making any compensation to the plaintiff for depriving him of the loss sustained by preventing him from using the surplus water-power at the lock No. 8, as secured to said Clark Williams and his assignee above referred to.

And the petitioner further says that it was further claimed by
10 said City of Cincinnati, that under the above act the said city had the right to and did direct the course of the surplus water issuing from lock No. 7 to be turned from lock No. 8, then owned by this petitioner without making any provision for compensating the plaintiff for the injury done him by depriving him of the use of the water at lock No. 8, as aforesaid.

And the said supreme court of Ohio in making said decision, and in rendering judgment, also certified that the plaintiff claimed to recover in the action damages of the defendant in error for depriving him of the use of the surplus water power at lock No. 8 in the city of Cincinnati, which he claimed to own by virtue of the lease from the State of Ohio to Clark Williams (and assignments to him), dated the 26th day of March, 1836, being paper marked B in the record, and the agreement to reduce the rent dated the 1st Nov., 1853, being paper marked A in the record, and the defendant gave in evidence a law passed by
11 the Ohio legislature entitled an act authorizing the city of Cincinnati to enter upon and occupy a part of the Miami and Erie Canal as a public highway and for sewerage purposes, a copy of which is inserted in the record, and claimed that by virtue of said act the city of Cincinnati had power so to lay out what is called the Eggleston Avenue as to cut off the supply of water after being used at lock No. 7 to lock No. 8, owned by the plaintiff, without liability to plaintiff for

any damage occasioned to him by such act, and the court ordered it to be certified that said plaintiff in error asked the court to hold that said act of the legislature passed on the 24th of March, 1863, is repugnant to the 5th, 13th, 14th, & 15th articles of amendments to the Constitution of the United States, and are void so far as they authorized the city to injure or destroy or make less valuable the said water-power of the plaintiff without making compensation for such injury. But the court ordered and adjudged that the said act was not repugnant
12 to articles of the 5th, 13, 14, or 15th of the amendments to the Constitution of the United States, and thereby affirmed said judgment of the court of common pleas of Hamilton County.

And it was further ordered by the court to be certified that the question of the validity of said act of the general assembly of the State of Ohio, passed 24th March, 1863, in the particulars mentioned, was drawn in question on the hearing and decision of said cause as being repugnent to the above mentioned articles of amendments to the Constitution of the United States, and that the decision of the court was in favor of the validity of said act. It was further certified that the said supreme court is the highest court of law and equity in the State of Ohio in which a decision can be had. All which will more fully appear by reference to the record.

And the said Charles Fox comes and says there is manifest error in the decision of the supreme court of the State of Ohio to his pre-
13 judice, and he assigns as cause, of errors in this, to wit:

First. In deciding that the act passed by the legislature of the State of Ohio, on the 24th day of March, 1863, was not repungent to the Constitution of the United States.

Second. In deciding that under the said act the City of Cincinnati could injure or destroy the water power owned by plaintiff at lock No. 8, without making compensation for such injury and destruction.

Third. Because said supreme court of Ohio ordered the said judgement of said common pleas to be affirmed when the court ought to have reversed said judgement of the court of common pleas.

For these and other errors in said record appearing, he prays said judgement of said supreme court of the State of Ohio may be reversed.

CHARLES FOX, *Petitioner.*

(Indorsed:) Supreme Court of the United States, Charles Fox vs. the City of Cincinnati. Petition in error. Charles Fox, petitioner.

14 Know all men by these presents, that we, Charles Fox, Nicholas Bird & Timothy D. Lincoln, are held and firmly bound unto the City of Cincinnati, in the full and just sum of two hundred and fifty dollars, to be paid to the said City of Cincinnati, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 17th day of March, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas, lately at a supreme court of the State of Ohio, in a suit depending in said court, between Charles Fox vs. the City of Cincinnati, judgment was rendered against the said Fox, and the said Fox having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said City of Cincinnati, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Charles Fox shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

CHARLES FOX. [L. S.]
NICHOLAS BIRD. [L. S.]
T. D. LINCOLN. [L. S.]

Sealed and delivered in presence of—
Approved by

PHILIP B. SWING.
N. H. SWANYE.

(Indorsed:) Charles Fox vs. the City of Cincinnati, security for costs.

15 THE STATE OF OHIO:

At a supreme court of the State of Ohio, begun and held in the court-room in the capitol, at the city of Columbus, within and for said State, on Monday, the second day of December, in the year of our Lord one thousand eight hundred and seventy-eight, before the honorable William White, chief justice, Hon. W. J. Gilmore, Hon. George W. McIlvaine, Hon. W. W. Boynton, and the Hon. John W. Okey, judges of said court; among other proceedings were the following to wit:

CHARLES FOX
vs.
THE CITY OF CINCINNATI. } Error reversed in the district court of Hamilton County.

Be it remembered that heretofore, to wit, on the 28th day of November, A. D. 1874, came the said plaintiff, Charles Fox, and filed in our said supreme court here, a certificate of reservation from the district court of Hamilton County, which certificate was in the words and figures following, to wit:

THE STATE OF OHIO,
Hamilton County, ss:

District court of the State of Ohio, fifth judicial circuit, Hamilton County, Ohio, Min., 135, October term, 1874.

CHARLES FOX
vs.
16 THE CITY OF CINCINNATI. } 2296. Error.

The court considering the questions involved in this cause are important and difficult, on the motion of the plaintiff's attorney in the cause, it is ordered that the cause be reserved and sent to the supreme court for its decision.

Reserved to the supreme court.

STATE OF OHIO,
Hamilton County, ss:

I, W. M. Trevor, clerk of the district court of Ohio within and for the fifth judicial circuit, do hereby certify that the above and foregoing is a correct copy of the order of reservation in cause No. 2296, wherein Charles Fox is plaintiff and the City of Cincinnati is defendant, as the same ap-

pears from the journal of said court, page 135, October term, 1874, now remaining in my office.

In testimony whereof I, the clerk aforesaid, have hereunto set my hand and affixed the seal of said court, at Cincinnati, in said county, this 19th day of November, A. D. 1874.

[SEAL.]

W. M. TREVOR,
Clerk District Court of Ohio.
By EMIL HOFFMAN,
Deputy.

At the same time, to wit, on the 24th day of November, A. D. 1847, said plaintiff filed with said certificate of reservation his petition
17 in error used in the district court, which petition in error was in the words and figures following, to wit:

Hamilton County district court.

CHARLES FOX.
vs.
THE CITY OF CINCINNATI.

The petition of Charles Fox shows that in a trial in which the petitioner was plaintiff and the City of Cincinnati defendant, at the January term of the court of common pleas, in the county of Hamilton, a judgment was rendered in favor of the City of Cincinnati against the said plaintiff, and also for the costs of the said suit, amounting to the sum of $146.20.

The plaintiff hereto attaches and files an abstract of the proceedings had in said cause; also the original papers in the case.

And the plaintiff says that in the proceedings and trial of said cause, and in the judgment rendered in said cause in said court of common pleas, manifest error to his prejudice has been committed.

And he assigns the following causes of error:

First. In construing the lease from the State of Ohio to Clark Williams, in the record appearing, by declaring the State of Ohio had the right by law to abandon the use of the canal in the city of Cincinnati, whether the canal water was required to supply the navigation of the canal or not, which decision, he claims, affects his contract rights
18 as assignee of Clark Williams, and violates the Constitution of the United States.

Also in its charge to the jury.

Also in refusing to charge the jury as requested by the plaintiff.

Also in overruling part of the questions and answers of Jacob G. Giesendorff in his two depositions.

Also in overruling the motion for a new trial.

For these and other errors in said record appearing, the plaintiff asks that said judgment may be reversed, set aside, and held for naught, and that plaintiff may be restored to his rights.

FOX & BIRD, *Att'ys.*

On said petition were the following endorsements:

2296. Ham. County district court. Charles Fox vs. The City of Cincinnati. Petition in error. Fox & Bird, att'ys.

I waive the issue of process in this case, acknowledge service, and enter a voluntary appearance for the City of Cincinnati.

A. E. CRAMER,
Ass't Solicitor.

Filed May 29, 1874. W. M. Trevor, clerk.

Thereupon, and accompanying said certificate of reservation and petition in error, was filed a transcript of the docket and journal entries of the court of common pleas of Hamilton County, and also the original files and pleadings of said court; which transcript, files, and pleadings were in the words and figures following, to wit:

19 Be it remembered, that in the records of the court of common pleas, within and for the county of Hamilton and State of Ohio, appear the following docket and journal entries, to wit:

CHARLES FOX, PLAINTIFF,
vs.
THE CITY OF CINCINNATI, DEFENDANT. } 36883.

Fox & Bird.
To March 27, 1871.
Petition filed " 18, "
Summons in action for the recovery of money as damages.
Am't claimed, $32,000.00.
1871, March 18. Summons issued.
" " 27, " returned.
1871, March 22. Served the within named, the City of Cincinnati, by delivering a true copy hereof to John S. Connor, assistant city solicitor, personally.

J. E. HEART, *Sh'ff.*
By IRA H. BIRD, *D'p'ty.*

1871, Ap'l 15. Default for answer.
" May 12. Deposition for pl'ff filed.
" June 8. Motion to compel pl'ff to select cause of action to filed.
" Dec. 19. Min., 281. Motion granted and petition amended, by leave of court.

On motion by the defendant to compel the plaintiff to elect to proceed on one of the two causes of action set forth in the petition, the court intimated an opinion that such election ought to be made unless the plaintiff amended his petition so as to make one cause of action instead of two, and thereupon the court granted the plaintiff so to
20 amend his petition, and thereupon the plaintiff, by leave of court, amended his petition by striking out all after the words "has so continued," on page 5 of the petition, and adding to the petition the amendment embraced in the paper A, now attached to the plaintiff's petition.

1872, Jan'y 16. Motion to make Little Miami Elevator Co. a party def't filed.
" Feb'y 10, Min., 231. Motion withdrawn.
Motion heretofore filed January 16, 1872 is now, by leave of court, withdrawn.
1872, Feb'y 21. Demurrer filed.
" Ap'l 12 Min., 1077. Demurrer filed by leave.
The demurrer heretofore filed in this cause having been withdrawn, but it now appearing that defendant is desirous of refiling said demurrer, and makes its motion therefor, leave is hereby granted by the court to file such demurrer.
1872, June 6. Min., 606. Leave to amend petition.
On motion by the defendant to compel the plaintiff to elect to proceed

on one of the two causes of action set forth in the petition, the court intimated an opinion that such an election ought to be made unless the plaintiff amended his petition so as to make one cause of action instead of two, and thereupon the court granted the plaintiff leave so to amend his petition, and thereupon the plaintiff by leave of court amended
21 his petition, by striking out all after the words "has so continued" on page 5 of the petition, and adding to the petition the amendment embraced in the paper "A" now attached to the plaintiff's petition. All of which has heretofore been done.

1873, June 2d. Min., 193. Demr. overruled and 10 days for ans.; def't excepts.

This cause came on to be heard on the demurrer filed by defendant to the plaintiffs petition, and was argued by counsel, and the court order and adjudge that the demurrer be overruled and grant leave to file an answer in ten days. Defendant excepts.

1872, July 8. Ans. & cross petition filed.
" " " Summons issued to July 22, 1872.
" " 22. " returned

1872, July 12. Served the within named Little Miami Elevator Company by delivering copy to Peter Andrew, pres't. of said company, at its regular place of business, personally.

JOS. E. HEART, *Sh'ff.*
By L. A. MARTIN, *D'p'ty.*

1872, July 30. Reply filed.
" Aug. 10. Default for answer as to L. M. Elevator Co.
" Nov. 4. Demand for struck jury filed. Nov. 8, notice issued.
1873, June 21. Demand for struck jury filed. June 23, notice issued.
" " 25. Venire for struck jury issued.
" " 27. Special venire issued.

22 1873, June 26. Min., 876. Venire for struck jury returned.

The venire facias for a struck jury heretofore issued for the following named persons, to wit: P. K. Theobald, C. F. Wilstach, Gustav Wendel, Joseph De Camp, B. W. Putnum, George Uphoff, L. Newburgh, Val. Wettingel, W. C. Kennett, W. Huddart, E. A. Herod, C. R. Whetston, Carl C. Davis, Wm. B. Maddux, James S. Kardon, and M. Van Pott was duly returned by the sheriff this day with his return thereon endorsed as follows, to wit: 1873, June 26. Served the within named C. F. Wilstach, Val. Wettingel, George Uphoff, and William Huddart each with a summons personally; also served Carl C. Davis, L. Newburgh, P. K. Thoobald, Gustav Wendel, Joseph De Camp, B. W. Putnam, W. C. Kennett, E. A. Herod, Wm. B. Maddux, James Skardon, and M. Van Rott with a summons by leaving same at their respective residences; C. R. Whetstone not found; George W. Ziegler sheriff, by Malony, de'p'y. And upon calling the same in open court the following answered to their names, to wit: P. K. Theobald, C. F. Wilstach, Joseph De Camp, B. W. Putnam, George Uphoff, L. Newburgh, Val. Wettinzel, W. C. Kennet, Wm. Huddurt, Carl C. Davis, W. B. Maddux, James Skardon, and M. Van Pott, and for good cause shown court excused L. Newburgh.

23 1873, June 27. Professional statement of city solicitor filed.
1873, June 30. Min., 880. Special venire returned.

The special venire facias for a petit jury heretofore issued returnable this day for the following named persons, to wit: Fred. Pastet, John B. Kline, W. S. Mullen, J. W. Parker, Louise Krouse, P. Newhall, James W. Sibley, Martin Weber, George H. Proctor, M. F. Thompson, George

F. Ireland and James McKeehan was duly returned by the sheriff with his return endorsed thereon as follows to wit: 1873, June 30. "Served the within named J. B. Kline, W. S. Mellen, Louis Krouse, J. W. Sibley, Martin Weber and G. F. Ireland each with a summons personally. Also served P. Marshall, M. F. Thompson, George H. Proctor and James McKeehan each by leaving a summons at their respective residences. Fred. Pustet, and J. W. Parker not found. George W. Ziegler, sheriff, by James Malony, dep'ty. And upon calling the same in open court the following answered to their names, to wit: J. B. Kline, W. S. Mellen, Louis Krouse, James W. Sibley, Martin Weber, George F. Ireland and James McKeehan.

1873, June 30. Min., 880. Jury sworn.

This day came the said parties by their attorneys and also came the following named persons as jurors to wit:

1. James W. Sibley,
2. George Ireland,
24 3. John B. Kline,
4. Carl C. Davis,
5. P. K. Theobald,
6. Val. Wettinzel,
7. Martin Webber,
8. M. Van Pelt,
9. James Skardon,
10. William Huddurt,
11. M. F. Thompson,
12. Joseph De Camp.

Who were duly empaneled and sworn according to law, and the trial proceeded and the said jury heard the testimony as adduced by the parties, whereupon the cause and jury were adjourned until Tuesday, July 1st, 1873, at 10 o'clock a. m.

1873, July 1. Min., 882. Cause progressed.

This day again came the said parties, by their attorneys, and also came the jury heretofore empaneled and sworn herein, and the trial proceeded and the said jury heard the testimony so far as adduced by the parties, whereupon the cause and jury were adjourned until Wednesday, July 2d, 1873, at 10 o'clock a. m.

1873, July 2d. Min., 883. Cause progressed.

This day again came the said parties, by their attorneys, and also came the jury heretofore empaneled and sworn herein, and the trial proceeded and the said jury heard the testimony so far as the same was adduced by the parties, whereupon the cause and jury were adjourned until Thursday, July 3d, 1873, at 10 o'clock a. m.

1873, July 3. Min., 884. Cause progressed.

This day again came the parties, by their attorneys, and also
25 came the jury heretofore empaneled and sworn herein, and the trial proceeded and the said jury heard the testimony as adduced by the parties, whereupon the cause and jury were adjourned until Saturday, July 5, 1873, at 10 o'clock a. m.

1873, July 5. Min., 884. Verdict for pl'ff; dam'gs, $3,250.00; jury fee, 6.00.

This day again came the said parties, by their attorneys, and also came the jury heretofore empaneled and sworn herein, and the trial proceeded and the said jury having heard the argument of counsel and the charge of the court, retired to their room under charge of the sheriff to consult of their verdict.

And now come said jury into open court with their verdict in writing signed by their foreman, and say:

We, the jury in the issue joined, find for the plaintiff and assess his damages in the sum of thirty-two hundred and fifty dollars, ($3,250.00).

J. W. SIBLEY, *Foreman.*

1873, July 5. Motion for a new trial filed.
" " 7. Min., 885. Motion overruled, and judg't on verdict for pl'ff.
Damages, $3,250.00. 2d trial allowed. Bond, $65,000.00.

CHARLES FOX, PL'FF,
vs.
THE CITY OF CINCINNATI, DEF'T. } 36883. Money.

This day came the said parties, by their attorneys, and thereupon the motion of the defendant to set aside the verdict for the plaintiff, as hereinbefore rendered assessing his damages at $3,250.00, and to grant a new trial came on to be heard, on consideration whereof the court overrule said motion. It is therefore considered by the court that the said plaintiff recover of the said defendant said sum of thirty-two hundred and fifty dollars, his damages assessed, together with his costs herein expended.

And now comes the defendant and gives notice of its demand for a second trial herein, and the court being of the opinion that the case is one, in which either party might have demanded a trial by jury, allow said second trial and fix the undertaking therefor in the sum of six thousand five hundred dollars, conditioned according to the statute in such case, made and provided.

1873, July 12. Bond 34, book 4, in $6,500.00, filed by def't for 2d trial.
" Oct. 3. Depositions for pl'ff filed.
1874, Jan'y 5. Demand for struck jury filed; notice issued.
" " 7. Venire for struck jury issued.
" " 10. Depositions for pl'ff filed.
" " 12. Min., 708. Venire for struck jury returned & called, and jurors discharged until Friday, June 16th, 1874, at 10 o'clock, and rules and attachments ordered and issued against absent jurors, returnable same day.

The venire facias for a struck jury heretofore issued, returnable this day was duly returned by the sheriff of Hamilton County, with his endorsement thereon that he had served Samuel C. Tatum, William Sumner, W. C. Peale, A. Compton, D. D. Martin, O. B. Farrelly, A. B. Temple, J. H. Funk, Geo. M. Hord, and J. H. Hewes, each with a true copy at their respective residences, and Pierson West, James J. Farran, and John Hutton personally, and Charles Dexter, J. H. Jouvet and A. Gunnison returned not found; and the said venire being called by the sheriff, the following persons answered to their names, to wit: Samuel C. Tatum, William Sumner, Pierson West, W. C. Peale, C. B. Farrelly, A. Gunnison, George M. Hord, and J. H. Hewes, and the said jurors are now discharged until Friday morning, January 16th, A. D. 1874, at 10 o'clock.

And the court now order that writs of attachment issue against James J. Farran and John Hutton, and also that rules issue against Alex. Compton, D. D. Martin, A. R. Frenkel, and J. H. Funk returnable Friday morning, January 16, A. D. 1874, at 10 o'clock, which is accordingly done.

1874, Jan'y 16. Min., 713. Special venire ordered to fill the panel, returnable January 19, A. D. 1874, at 10 o'clock, to which time other jurors heretofore summoned are adjourned.

In this case the jury not having been made from the 16 jurors heretofore selected and summoned in this case, now, on motion

to the court by counsel for plaintiff and defendant, the court does hereby select the following persons to fill said panel: William Lynn, H. Boyd, Christian Boss, Christian Kleb, A. W. Francis, P. M. B. Lake, C. Behlen, John Silvers, J. B. Darby, Hosea Riter, William Russell, Frederick Autenheimer, and does hereby order the sheriff to summon said jurors so selected to appear in the case on Monday, January 19, 1874, at 10 o'clock a. m. This order made by consent of both parties. And the other jurors heretofore summoned and adjourned until to-day are now adjourned until Monday morning, January 19, A. D. 1874, at ten o'clock.

1874. Jan. 16. Min., 713. Attachment ag'st John Hutton, juror discharged.

The court now order that the rule heretofore issued against John Hutton as a struck juror in this case be, and the same is hereby, discharged.

1874. Jan. 16. Special venire issued.

" " 19. Min., 713. Special venire returned and called, and jury empaneled and sworn, and cause progressed.

This day came the parties by their attorneys and the venire
29 facias heretofore issued by order of court to complete the panel being returned by the sheriff of Hamilton County, with his endorsement thereon that he had served William Lynn, Christian Boss, and C. Behlen, each by a true summons personally, and H. Boyd, Christian Kleb, A. W. Francis, John Silvers, J. B. Darby, William Russell, and Frederick Autenheimer at residence, and as to P. M. B. Lake and Hosea Riter returned not found. And the said venire being called by the sheriff the following persons answered to their names, to wit: H. Boyd, Christian Boss, Christian Kleb, A. W. Francis, C. Behlen, John Silvers, J. B. Darbey, and William Russell. And for good cause shown the court excuse Christian Boss and C. Behlen.

And the struck jurors heretofore summoned and adjourned until to-day being called by the sheriff the following persons answered to their names to wit: Samuel C. Tatem, William Sumner, Pierson West, O. B. Farrelly, John Hutton, and J. H. Hewes. And now comes the jury as aforesaid as follows, to wit:

1. Samuel C. Tatem.
2. William Sumner.
3. Pierson West.
4. O. B. Farrelly.
5. John Hutton.
6. J. H. Hewes.
7. William Russell.
8. H. Boyd.
9. Christian Kleb.
10. A. W. Francis.
11. John Silver.
12. J. B. Darby.

30 Who were duly empaneled and sworn to well and truly try the issue joined in this cause, and the trial proceeded, and cause progressed, and the same not being concluded the said jury was adjourned until Tuesday morning, January 20, A. D. 1874, at 10 o'clock.

1874. Jan. 20. Min., 716. Cause progressed.

This day again came the parties by their attorneys, and also came the jury heretofore empaneled and sworn in this cause, and the trial proceeded, and the cause progressed, and the same not being concluded the said jury and trial was adjourned until Wednesday morning, January 21st, A. D. 1874, at ten o'clock.

1874. Jan'y 21. Min., 717. Rule ordered against John Boyle.

The court now order that a rule issue against John Boyle to testify as a witness in behalf of the defendant, and show cause why he should not be attached for contempt in not attending as a witness on subpœna served by copy at residence, and the same is accordingly issued.

1874. Jan'y 21. Min., 717. Rule ordered and issued against Isaac Greenwald.

The court order that a rule issue against Isaac Greenwald to
31 testify as a witness in behalf of defendant, and show cause why he should not be attached for contempt in not attending as a witness on subpœna served by copy at residence, and the same is accordingly issued.

1874. Jan'y 21. Min., 717. Cause progressed.

This day again came the parties by their attorneys, and also came the jury heretofore empaneled and sworn in this cause, and the trial proceeded, and cause progressed, and the same not being concluded, the said jury and trial was adjourned until Thursday morning, January 22d, A. D. 1874, at 10 o'clock.

1874. Jan'y 22. Min., 718. Cause progressed.

This day came the parties by their attorneys, and also came the jury heretofore empaneled and sworn in this cause, and the trial proceeded, and cause progressed, and the same not being concluded, the trial and jury were adjourned until Friday morning, January 23, A. D. 1874, at ten o'clock.

1874. Jan'y 23. Min., 719. Cause progressed, and jury adjourned to January 26, '74, at ten o'clock.

This day came the parties by their attorneys, and also came the jury heretofore empaneled in this case, and the trial proceeded, and cause progressed, and the same not being concluded, the trial and jury were adjourned until Monday morning, January 26th, A. D. 1874, at ten o'clock.

32 1874, Jan'y 26. Min., 720. Demurrer of Little Miami Elevator Co. filed by leave to cross-petition of city.

Leave is given the defendant the Little Miami Elevator Company to file its demurrer to the cross-petition of the City of Cincinnati, which is accordingly done.

1874, Jan'y 26. Min., 720. Demurrer of Little Miami Elevator Co. to cross-petition of City of Cincinnati, sustained and Little Miami Elevator Co. dismissed out of the action; City of Cincinnati excepts.

This cause coming on to be heard on the demurrer of the Little Miami Elevator Company to the cross-petition of the City of Cincinnati, was argued by counsel, and the court, being fully advised, is of opinion that the said demurrer is well taken, and the same is sustained, and it is ordered that this defendant, the Little Miami Elevator Company, be dismissed out of this action and have judgment for its costs. To all of which the City of Cincinnati, by its counsel, excepts.

1874, Jan'y 26. Min., 721. Cause progressed.

This day again came the parties, by their attorneys, and also came the jury heretofore empaneled and sworn in this cause, and the trial proceeded and cause progressed, and the same not being concluded, the said jury and trial were adjourned until Tuesday morning, January 27, A. D. 1874, at ten o'clock.

33 1874, Jan'y 27. Min., 723. Verdict for def't. Jury polled. Jury fee $.

This day again came the parties, by their attorneys, and also came the jury heretofore empaneled and sworn in this cause, and the said jury, after hearing the charge of the court, retire to their room in charge of the sheriff, to consult of their verdict. And now comes the said jury into open court with their verdict in writing, signed by their foreman and also by each and all of the other jurors, and say: "We, the jury in the issue joined, find for the defendant. J. H. Hewes, fore-

man; William Sumner, Sam'l C. Tatem, J. B. Darby, Christian Kleb, John Silver, H. Boyd, John Hutton, Pierson West, O. B. Farrelly, A. W. Francis"; and on motion of counsel for the plaintiff the jury was polled, and each and all of the jurors, being severally enquired of if the "verdict just read was his verdict," they each and all severally arose in their seats as their names were called and answered in the affirmative.

1874, Jan'y 27. Motion to set aside verdict, and for a new trial filed.
" " " 2d motion for a new trial filed.
" M'ch 31. Min., 804. Motion for a new trial overruled, & judg't ag'st pl'ff for costs. Record received and bill of exceptions allowed, &c.

34 CHARLES FOX *vs.* THE CITY OF CINCINNATI. } 36,883. Damages.

The motion for a new trial in this case by the plaintiff is ordered to be overruled by the court. A bill of exceptions is signed, sealed, and allowed, and ordered to be made a part of the record, and thereupon judgment is rendered against the plaintiff for costs, and by consent of the plaintiff and defendant the making a record of this cause is waived by the parties.

THE STATE OF OHIO,
Hamilton County, ss:

I, W. M. Trevor, clerk of the court of common pleas within and for the county of Hamilton and State of Ohio, do hereby certify that the foregoing is a full and correct transcript of the docket and journal entries in the case of Charles Fox against the City of Cincinnati No. 36883, as the same appear from the dockets and journals of the said court now in my office.

Witness my hand and the seal of said court, at Cincinnati, this 16' day of April, A. D. 1874.

[SEAL.] W. M. TREVOR,
Clerk Court Com. Pleas, Ham. Co., Ohio.

35 Supreme court of Ohio.

RECORD IN CHARLES FOX, PLAINTIFF IN ERROR, VS. THE CITY OF CINCINNATI, DEFENDANT.—FILED MAY 20, 1876, IN SUPREME COURT.

Jordan & Jordan, and Charles Fox, attorneys for plaintiff in error.

36 *Petition—27th March, '71.*

Ham. com. pleas.

CHARLES FOX *vs.* THE CITY OF CINCINNATI. } Petition filed in 1865.

The original petition being mislaid, a new and amended petition was filed, and reads as follows:

The petition of Charles Fox, the plaintiff, states for the first cause of action that by an act of the general assembly of the State of Ohio, on the 24th of March, 1863, entitled "An act to authorize the city of Cincinnati to enter upon and occupy a part of the Miami and Erie

water power at or from lock No. 8 of said canal, or as to the nature of the title thereto which he may have possessed, and it therefore denies each and all of plaintiff's allegations in relation thereto, and demands proof thereof.

Defendant denies that on September 22d, 1864, there was situated on the lot described in plaintiff's petition, a water-power mill-wheel, and, on the contrary, avers that the mill and all its machinery and appendages excepting the foundations, were several years before entirely destroyed by fire. He denies plaintiff at that time owned the use of water power to propel six run of stone at lock No. 8 on said canal, as alleged, or the use of any water power whatever, and, on the contrary, avers that the water power at said lock No. 8 was never of any practical value, owing to interruptions of the same by the rise and fall of the Ohio River; and, in consequence, it was necessary to provide and use steam power in mills situated at or below said Lock No. 8; and for this reason this mill was run for many years prior to its destruction entirely by steam power, and whatever power which may have been derived from said lock and used in said mill, the same was totally abandoned long before the time such mill was destroyed as aforesaid, and has never since been used for any purpose whatever. That since May, 1852, no rent has been paid by plaintiff for the use of said water power, and he has broken and disregarded other covenants of any lease or grant which he could have held by virtue of the act of the general assembly heretofore referred to. That the State and its agents have long since considered and treated plaintiff's claim to said water power as terminated, and do not recognize him as having or owning any interest whatever under or by virtue of any lease or other claim whatever.

FURTHER ANSWER.—Defendant avers that if ever plaintiff received a lease or grant of any kind for the use of water power from said lock No. 8 it was under and by virtue of the statutes of Ohio, made and provided for such cases, and that he accepted the same upon the condition that the State might at any time, without liability, abandon the canal and divest plaintiff of his water power. That the entire Miami and Erie Canal, including that portion which was received as aforesaid by the defendant, under the act of March 24th, 1863, was originally constructed, and for many years afterwards used for the purpose of navigation, but by the passage of said act, granting said portion of the canal to defendant, on the 24th of March, 1863, and for a long time prior thereto, the portion of the canal so granted was entirely
38 abandoned by the State and its agents, for the aforesaid purposes, commerce and navigation. That the State and its agents did, at the passage of said act on the 24th of March, 1863, consider and treat said water power at lock No. 8 as totally abandoned, and all rights thereto as wholly divested.

Defendant, for further answer to plaintiff's claim, admits that it condemned and appropriated to the public use for the purpose of widening Eggleston avenue that portion of the lot described in the petition in which it is admitted plaintiff owned an equitable interest, and that the verdict of the jury was rendered therein April 8th, 1865, as is alleged. It is also admitted that the water-power of lock No. 8, when employed at all after 1840, was used in the portion of the premises so condemned and appropriated by defendant, and avers that the damages for the lot so appropriated was fixed at $3,000; that it was intended to and did include full compensation for all interests in or connection with, and all improvements on the ground taken, together with all damages which accrued to such portion of the property of every kind which was not

taken; and that plaintiff, together with those holding the legal title to said property, were paid and received the sum of $3,000 in full satisfaction for said property and all interests therein or in any manner connected therewith. And if plaintiff ever owned the use of water-power at lock No. 8, and if the portion of the canal aforesaid was never abandoned and his rights thereby divested, or if plaintiff's use of said water-power was never abandoned or terminated either by the State or its agent, still defendant avers that plaintiff was fully compensated for said water-power when he received his portion of the $3,000 aforesaid.

Defendant denies that the use of the water at lock No. 8 for mill purposes was destroyed or in any way effected by any diversion of the water from the channel of the canal or by the construction of the sewer, as alleged; denies that the value of the water-power claimed to have been destroyed was of the value of $50,000; and denies the plaintiff has sustained a yearly loss of $10,000, or an aggregate loss of $60,000, as alleged.

There is a clause in the answer making the Little Miami Elevator Co. a party defendant; but as the Elevator Co. was dismissed, this part of the answer is unnoticed.

The answer denies all the allegations not admitted.

Replication.—Filed 30, *July*, 1873.

Says the water-power described in the petition was of practical value, was in fact of great value, and was in actual use for several years; that although subject to interruption from backwater occasionally, yet such interruption did not exceed three months in the year, and during the interruption by backwater steam power was used; yet for nine months in the year said water-power was used. And during that time no steam power was used, nor was the use of said water-power in any way abandoned.

He admits that from the negligence of the officers in charge of the canal, the lock-gates were suffered to become dilapidated and out of repair for some time, and thereby deprived of the use of said water-power. He did not pay the water rent and was not bound to do so, but he was always ready to pay his rent if the State would keep the locks in repair according to the requirements of the lease.

Plaintiff denies the charge that the State has ever abandoned said canal or its right to collect the water rents due at lock No. 8, but on the contrary, has expressly reserved its rights to such water-powers, and made the defendant liable for all damages occasioned by the destruction or injury to said water-power.

The plaintiff most positively denies the city has ever, by legal process, condemned the said water-power in any legal proceedings.

He admits said defendant, on the 24th of September, 1864, filed a petition in this court to condemn about nineteen feet of ground on the west side of plaintiff's lot as described in the petition in this case; and such proceedings were had in said cause, that on the 18th day of April, 1865, a jury impanneled in said cause rendered a verdict finding upon one state of facts in favor of this plaintiff for the ground taken, $4,000, and upon another state of facts, $2,895, subject to the opinion of the court. And the case was continued from term to term until the 4th day of January, 1866, when, without the court deciding the question left to it by the jury, this plaintiff and the City of Cincinnati compromised and settled the matter as the value of said nineteen feet of ground in the following manner, viz:

This plaintiff to receive the sum of $3,000 for said nineteen feet of ground, and to have the privilege of removing and using the stone and materials then on said lot; and the water of this plaintiff at said lock No. 8 was not to be prejudiced on said premises—all of which fully appears on the minutes of the court.

At that time the city authorities pretended they did not contemplate the permanent destruction of said water-power at lock No. 8, but intended and expected to convey the water used at the lock north of lock No. 8 by a tail-race of sufficient size and level to operate as a head-race for use of the water at lock No. 8; and after building the sewer, in which an opening was left for the discharge of the used water at lock No. 8; and the city did, in fact, on the day of , contract with John Boyle for constructing the tail and head-race aforesaid, so as to furnish the necessary water-power to run said six run of stone at lock No. 8 on the premises of the plaintiff. But afterwards, by mutual agreement, said contract was abandoned, and no part of said race-way has been built and is not intended to be built.

39 Plaintiff denies that said sum of $3,000 received by him under said agreement, so entered on the minutes of the court as above stated, was received in full or even in part satisfaction for the injury done to his water-power at lock No. 8. In fact no evidence was offered on the condemnation of said nineteen feet of ground before the court and jury of the value of said water-power, as it could by a small additional cost be used by the plaintiff on the balance of his lot east of said nineteen feet appropriated for Eggleston avenue, and this plaintiff has never been in any wise compensated for the injury done to and for his loss of said water-power.

The balance of the replication relates to the Little Miami Elevator Co. and is unnecessary to be copied.

First trial.

First trial: Jury find for plaintiff $3,250.00, 5th July, 1873.

Second trial.

Second trial allowed, 27th January, 1874; verdict and judgment for defendant.

On error to district court, the court reserve the case for decision by supreme court, 13th November, 1874.

Evidence contained in bill of exceptions—(Page in bill of exceptions pa. 48, B.)

Lease from the State of Ohio to Clark Williams, of the use and occupation of all the water-power owned by the State at the locks on the Miami Canal, within the corporate limits of the city of Cincinnati, being all the surplus water which may at any time pass the said locks, and which will not be requisite to pass boats and other floats through the locks, except all water heretofore leased to Wm. Richmond; his death and some other exceptions having nothing to do with the case.

The whole quantity specifically leased to be equal to a power to drive one pair of four and one-half feet diameter mill-stones, which, with the necessary machinery, will be capable of manufacturing 100 bushels of wheat into superfine flour in 24 hours, at the upper lock; three such powers at each of the second and third locks, and six such powers at each of the remaining seven locks.

The rent to be paid at each lock is fixed:

$75.00 for each pair of stones at lock No. 8 per year. By subsequent agreement the rent is reduced to $50.00 per run per year.

The lease is dated 26th March, 1836; contains usual covenants for re-entry for non-payment of rent.

(Paid, 53, 54.)

The lease contains a right on the part of the State in these words:

"And the said party of the first part reserves the right to resume at any time the use of the water hereby leased, whenever the same shall become necessary for the purpose of navigation, and to continue the use thereof so long as the same shall be necessary for the purpose aforesaid."

In September, 1854, in consequence of non-supply of water for more than one month in the year, occasioned by cleaning out the canal, the board of public works reduced the rent of water at lock No. 8 by the following agreement, (A)—Mr. Geisendorff then owning the power:

(A, 100.)

"This agreement, made this 20th day of September, 1854, between the State of Ohio, party of the first part, by Alexander C. Miller, acting commissioner of the board of public works, thereto duly authorized by law and by order of said board made in pursuance thereof, and by J. C. Geisendorff, of Cincinnati, Ohio, of the second part, witnesseth, that the party of the first part, in consideration of the agreement of the party of the second part hereafter mentioned, doth hereby reduce the rents of the water-power for six run of stone at lock No. 8, in said Cincinnati, occupied by said Geisendorff (and which was granted by the State of Ohio to Clark Williams by lease dated the 26th day of March, 1836), to $300 per year, to be paid semi-annually, at the times and places specified in said lease to said Williams, said reduction to take effect from November 1st, 1853.

"And the said party of the second part, now proprietor of said water-power at said lock, sufficient to propel six pairs of mill-stones, does hereby agree to pay the said party of the first part the said yearly rent of $300 at the times and places specified in said Williams' lease, instead of the rent reserved therein for said water-power, and to pay the same from said November 1st, 1853, forever; and does hereby release the said party of the first part from all obligations to make any deductions from rent as provided for in said Williams' lease, in consequence of deficiency of water-power hereafter.

"It is agreed that if the said party of the second part shall fail to make the payments aforesaid at the times and places specified in Williams' lease, and in all respects keep his agreements herein contained, then this agreement shall be null and void, so far as it extends to limit said State at its option.

"All the provisions, covenants, agreements, and reservations contained in said lease to Clark Williams are to be and remain in full force, except so far as they are necessarily modified by this agreement, signed the day and year above written.

"ALEX. P. MILLER,
"*Acting Commissioner Public Works.*"

40 (A, page 102. Geisendorff to Fox.)

"For and in consideration of eight thousand dollars, to me paid by Charles Fox, the receipt of which is hereby acknowledged, I, Jacob C. Geisendorff, do hereby transfer and assign to Charles Fox all my right

and interest in and to the lease of water power above set forth from Alex. P. Miller to me, dated the 20th of September, 1854; also all my right and title in and to the lease therein referred to, as made to Clark Williams, and which lease was agreed to be sold to me by Charles Fox; and the object of this transfer is to retransfer the same to said Fox in satisfaction of the $8,000 agreed originally to be paid, which I am not able now to pay said Fox, said Fox to pay water rents hereafter accruing.

"November 12th, 1855.

(Signed) "J. C. GEISENDORFF."

Made part of Geisendorff's deposition.

(A 2. 104.)

"Whereas J. C. Geisendorff has this day given his five promissory notes, amounting in all to ten hundred and sixty dollars and seventy-five cents, payable to A. P. Miller, for the use of the State of Ohio, at the L. & T. Co. Bank in Cincinnati, $200, with use, January 1st, 1854; $200, with use, April 1st, 1854; $260.75 May 1st, 1854; it is hereby agreed that said notes are to be held as merely collateral for the payment of rent due from said Geisendorff to the State of Ohio for water at lock No. 8, in Cincinnati, Ohio, and if paid as they become due shall be in full of all claims of the State for rent at said lock up to this date.

"November 1st, 1853.

"ALEX. P. MILLER,
"*Acting Commissioner Public Works.*"

(Act of 24th March, '63.)

Law of 24th of March, 1863, authorizing the city to lay out Eggleston avenue, was read, as follows:

"SECTION I. Be it enacted by the general assembly of the State of Ohio that authority and permission shall be granted in the manner pointed out to the city of Cincinnati to enter upon, improve, and occupy forever, as a public highway and for sewerage purposes, all or any of that part of the Miami and Erie Canal which extends from the east side of Broadway, in said city, to the Ohio River, including the width thereof as owned or held by the State; but the said grant shall be made subject to all outstanding rights and claims, if any, with which it may conflict.

"Provided, That no work shall be done by said city authorities on the premises hereby granted until the plan of improvement shall be approved by the board of public works.

"SEC. II. The said grant shall not extend to the revenues derived from the water privileges in said canal, which are hereby expressly reserved.

"And the said grant shall be made upon the further condition that the said city, in the use as aforesaid of all or any portion of said canal,

"Shall not obstruct the flow of water through said canal;

"Nor destroy nor injure the present supply of said water for milling purposes; and

"That said city shall be liable for all damages that may accrue from such obstruction or injury.

"But it is not intended hereby to relieve the lessees of said canal or their assignees from any responsibilities imposed upon them by an act to provide for leasing the public works of the State, passed May 8th, 1861;

"Or by the instrument of lease executed in pursuance of said act, except as and to the extent they may be interfered with, as said city may from time to time enter upon, improve, and occupy any part of said grant.

"SEC. III. Whenever the council of said city, by a vote of not less than two-thirds of the whole number of members thereof, shall decide to use said canal as hereby authorized, the council shall make known its decision to the governor, and thereupon the governor, in behalf of the State, shall execute and deliver to the city of Cincinnati a grant of the part of said canal herein described, for the uses and purposes before mentioned, and upon the terms and conditions specified in this act. The attorney-general shall prepare the form of said grant.

"SEC. IV. This act shall not be construed to confer upon said city any new power of taxation, or to borrow money, or to contract debts in the use aforesaid of said canal.

"SEC. V. This act shall take effect from and after its passage.

"JAMES R. HUBBELL,
"*Speaker of the House of Representatives.*
"B. STANTON,
"*President of the Senate.*

41 Paper O, page 105.

Only applies to water power above lock No. 7, and has nothing to do with this case.

(N.)

Deed board of public works to Little Miami Elevator Co. of water power of lock No. 8, of no importance in the case, as the Elevator Co. was dismissed.

(P, 109. State of Ohio to the city, 28th April, '63.)

Deed, The State of Ohio to the City of Cincinnati, 28th of April, 1863, recites the act of the 24th of March, 1863, and also the reservations and conditions of the act, grants the right to occupy Eggleston avenue as a public highway, subject to all outstanding rights and claims, if any, with which it might conflict, and the revenues derived from the water privileges in said canal thereby expressly reserved; that said city, in the use of the said canal, or any portion thereof, should not obstruct the flow of water through the same, nor destroy nor injure the present supply of said water for milling purposes.

(Governor. Deed to city.)

And that said city should be liable for any damages that might accrue from such obstruction or injury, and that whenever the council, by a vote of not less than two-thirds of the whole number of members thereof, should decide to use said canal, as in said act authorized, should make known its decision to, the governor, in behalf of the State, should execute and deliver to the city a grant upon the terms and conditions specified in the act; recites also that the city had decided to use the canal.

Bill of excep. Pages 1 to 8. Fox testimony.

CHARLES FOX testified as follows:

I think about 1840 I made a bargain with C. Williams to rent three run of stone.

In 1844 I purchased of Clark Williams the six run of stone at lock No. 8. The property was first used by Wm. Thompson, and then by R. C. Phillips, and then by J. C. Geisendorff.

Geisendorff built a large factory, and ran the cotton factory until 1855, when the factory was burnt down. He was much embarrassed, and after the fire he transferred the lease back again, dated September, 20th, 1854. He was then owing me $26,000. The original lease from the State of Ohio was at a rent of $450 a year. Afterwards, on the 20th of September, 1854, the State reduced the rent to $300 a year.

Prior to that time I transferred to Geisendorff all my right in the water power, and he built a cotton factory on the lot. I don't know where the agreement for sale between Geisendorff and myself is. I have lost it and have no copy. Afterwards, on November 12th, 1855, the mill was burned. Geisendorff made a retransfer to me of the water power. At that time Geisendorff was in debt to me $26,000. He also gave me an interest in a patent right, in addition to returning the property to me.

When the city brought suit to condemn the land there was no claim to condemn the water power with the nineteen feet.

The property was not used for water power after the mill burned down, because I had not means to build a mill.

In 1864 the city filed a petition to condemn nineteen feet of ground. I wrote letters to the city council showing that I claimed the water power in 1864, and other letters. Here witness reads deed from Charles Fox to the city, 21st of November, 1865, for nineteen feet of ground on Miami Canal, south side of Pearl street.

The foundations of the factory built by Geisendorff were solid stone work, and was standing at the time the deed was made, and long after.

After I sold to Geisendorff he carried on a cotton factory and put in a turbine wheel and ran it for a long time, until the mill burned down. For years after that I wrote to city solicitor, and once to council, claiming an interest in the water power. These were only permitted to be read to show he claimed the power. They are dated 20th of October, 1865; 27th of June, 1866; 17th of June, 1867; 3d of June, 1869, and 14th of November, 1870.

I paid no rent to the State after Geisendorff sold to me, because the State did not furnish the water required in full.

I think in 1866 I was informed a demand was made for rent due, but no demand was made on me.

There was a bill filed to forfeit the lease, on the ground that rent was not paid. This suit is still pending. They demanded $225 instead of $150 for the six months' rent, as I was informed. I afterward tendered to the State a semi-annual payment of $150, but they refused to take it. Afterwards Charles Kilgour claimed to have bought, in the name of the Elevator Company, the right of the State, the right accruing to the State at lock No. 8. I also tendered the rents to the Elevator Company, who claimed to own. They also refused to accept it. I never did abandon it, and never intended to. I was not able to put up a building so as to use the surplus water when the city undertook to build the sewer part of lock No. 8. Mr. Dare was engineer, and had charge of the work, and I urged him to leave a proper opening in the

sewer to let out the water after it left my mill. He left an opening which he thought sufficient.

Mr. Bateman asked me once where Geisendorff lived, and I told him he lived in Indianapolis. I don't know when the suit was brought to forfeit the lease. There has been no decree of forfeiture.

42 When the city filed a petition to condemn land they made me a party; when I got the $3,000 from the city I paid it to Longworth. Being unable to pay balance of $26,000 due on the lot, I made a quit-claim deed to the Little Miami Railroad Co., assignee of the executors of N. Longworth, for the lot east of the nineteen feet; this was in October, 1869.

Don't know what the value of water-power is. They deprived me of the use of water at the time they filed the petition to condemn. A party wanted to rent the water-power of three run of stone at lock No. 8 in the fall of 1864, but I could not rent it because the city could not furnish me water at the time.

Dare ascertained how many months in the year the backwater interfered with the use of the water at lock No. 8.

Geisendorff built his mill or factory so that the high water would not interfere with the first floor of his mill.

In order to make the sewer, the city turned the water into the old sewer, west of the canal at lock No. 7. The water now goes into the sewer at Third street, instead of taking the water down to my mill. The city has since proposed to remove the water-race, so as to go from Third street to my mill.

The city, at the time they were making this improvement, did not contemplate destroying my water-power. They made a contract with Mr. Boyle to build a tail-race to carry the water to lock No. 8 from lock No. 7, instead of throwing it into the sewer at lock No. 7.

On cross-examination, witness said: "I supposed the tail-race was to be built to preserve my water-power."

There is a provision in the contract between the city and Miami Machine Works that the water from No. 7 is to go into the top of the sewer below lock No. 7.

The reason the city has not gone on is because Kilgour got an injunction; don't know anything about the city's object.

Don't know that the council ever took action on my case.

My claim is for annual loss to my property. First agreement with Clark Williams was carried out until I bought his entire interest; think Mr. Thompson paid water rent as long as he had a saw-mill there. Don't know whether I paid the State rent or not. But Mr. Geisendorff paid all the rents while he was there.

I received an assignment from Geisendorff in 1855. I never paid any rent after that until they attempted to forfeit it. Cannot tell why rent was cheaper at lock No. 8 than above. Don't know when Geisendorff's mill was built. Had original agreement from Longworth for the title to the land at lock No. 8, almost 165 feet west of the canal. Don't know where the transfer from Clark Williams to me is; I have made full search for it; I suppose it is lost. He transferred to me his title to the water-power, and I transferred it to Geisendorff. Don't remember having any other transactions with Clark Williams. My arrangement with the contractor for the stone was while they were building the sewer. I told the man who was using the stone that I would expect to pay for it. Engaged Phillips, I think, to say what it would cost to carry the water down to my water-power. I don't know when I sold my interest in the land as above; I think it was in 1869. It was the interest in the

balance of 165 feet that I sold; received pay from the city for 19 feet; don't know what the railroad co. gave for the 165 feet.

I gave Longworth the $3,000 I got from the city.

The lock at No. 8 was, I think, in good condition when I got my transfer from Geisendorff; was afterwards told the gates were not in good repair.

The reason I did not pay rent was because the State did not keep up the repairs in the locks, as I was told; and I claimed a reduction from the rents.

Don't know how much of a head of water there was there. I knew there was a deficiency of water, because the lock gates were out of order, and was at the office of the canal collector to see about getting them to repair the gates. If the gates were not in repair, and would let the water through, it would spoil the water-power. Don't know how much head of water was there. I tendered the rent after I understood they attempted to forfeit it. I did not tell Mr. Bateman that Geisendorff went to Virginia. Don't remember the man's name who wanted to rent the water-power. Don't know what it would cost to put up a building there.

Re-examination:

I informed the city of the offer of this man to rent the water-power. I had a complete, equitable title to the land and water-power; sometimes I paid the taxes, and sometimes Longworth would pay them, and I paid him back.

43 There was not as much water there after the gates were out of repair as there was before.

47. On being recalled, he testified that Mr. Bateman was mistaken in supposing I told him Geisendorff lived in West Virginia. I told him he lived in Indianapolis. Mr. Bateman made no demand of rent, to my recollection, although he might have said he wanted to collect back rents.

Wirth, ev., page 22.

The defendant introduced Jacob Wirth, who testified that he was first city engineer in 1857, and from that time until 1869, except in the years 1861 to 1863. He had charge of all the calculations; made the original survey of Eggleston avenue, showing it to be ninety feet wide.

In 1863 the old cotton factory was then in ruins; the stonework was there, and part of the brick walls was standing. His impression was that the flume was broken down in part—not in a condition to pass water to the wheel. He knew this because he walked through the flume.

The siding on the lock gates was partially down, so that the water passed through the gates. When the nineteen feet of ground was condemned, the building projected out; no water passed through the flume.

He made a plat of the street and water connections (which he produced, and is part of bill of exceptions), marked I 7.

He also read the plan K, made for the board of public works, and the acceptance of the plan by the board of public works, L.

110. Paper K reads as follows:

"OFFICE OF BOARD OF PUBLIC WORKS,
"*Columbus, December 29th*, 1863.

"Present: Messrs. Torrence and Gamble.

"The city of Cincinnati, by the civil engineer, presented the plan for

improvement of Deercreek Valley, under the law passed March 24th, 1863, as follows, viz:

Plan to cut water off of Lock No. 8, pages 110 to 112.

"OFFICE OF CITY CIVIL ENGINEER,
"*Cincinnati, August 24th*, 1863.

"To the Board of Public Works of the State of Ohio:

"GENTS: By the provisions of section 1 of an act to authorize the city of Cincinnati to enter upon and occupy a part of the Miami and Erie Canal as a public highway, and for sewerage purposes, passed March 24th, 1863, it is provided that no work shall be done by said city authorities on the premises hereby granted until the plan of improvement shall be approved by the board of public works.

"In accordance with the above, I hereby submit a plat showing the canal as at present, with a sketch of the contemplated improvement, and the following plan for your approval.

"It is proposed making this improvement so as to provide suitable sewerage for the whole of the area drained by the present Deercreek sewer, and also to furnish an avenue of suitable width and grade for a thoroughfare from Broadway to the river, allowing the water-rights and privileges to remain to the lessees.

111. "In order to provide sewerage, it is proposed to construct a conduit for the drainage water, and also for all the water of the canal, making use of the lock walls whenever it can be done.

"Commencing near the outlet of the river, it is proposed to construct a sewer within the present lock walls and upon the present foundation timber, carrying the sewer, by regular inclination, to the level of the level of lock No. 4 at Third street. (This is lock No. 7 on the canal.)

"At this point (the lower part of lock 4), the sewer will receive all the water of the canal passing the mills. From the lower part of lock 4 (7), to lock No. 8, above Eighth street, it is proposed to build a sewer of sufficient capacity to drain all the water which may be thrown into it from the city and canal.

"At or near lock 8, above Eighth street, the main sewer will receive the sewers from Deercreek Valley and from Abigail and Sycamore streets; and from thence up to Lockport basin a sewer will be built, of sufficient capacity to convey the waste water of the canal, the water which may be necessary to draw off, for the purpose of cleaning the canal, as well as the sewerage of the city which may be drained to this point.

"In order to provide for the water to the mills below Sixth street on the east side of the canal, a wall on the east side of the present locks will be built from Third street to the upper end of lock 7, at such distance from the mills as to provide sufficient water-way for the mill water, and using the present tumbles. These walls will be so constructed as to permit this water-way to be arched over or carried up and finished for the time being with an iron railing to protect the travel of the street.

"From lock 7 to the tail-race from Bradbury's mill, a suitable water-way will be built to convey the water of the canal for the mills below Sixth street on the west side of the proposed sewer.

"This water-way will pass over the sewer at lock No. 7, and be arched over and covered by the earth forming the avenue.

"The water for the powers at locks No. 8 and 9 will be conveyed to the mills in a sewer of sufficient capacity.

"Locks No. 8, 9, and 10 will be taken out and the whole filled up to the original grade of the avenue.

44 "The materials of the locks, walls, and bridges will be used whenever they can be to advantage in the new work.

"(Signed) A. W. GILBERT,
"*C. C. Engineer.*

"Approved, and ordered to be transmitted to the board of public works, December 15, 1863.

"NORRIS R. NORTON,
"*Clerk of the Board of City Improvements.*"

Upon which the following order was passed:

Order to take water from lock 8, 112. *L.*

Under the act of the general assembly of the State of Ohio, "to authorize the city of Cincinnati to enter upon and occupy a part of the Miami and Erie Canal as a public highway and for sewerage purposes," passed March 24th, 1863, the city civil engineer and board of improvements of Cincinnati presented the plan of improvement for the acceptance of the board of public works. Now, therefore, it is ordered that the plan offered and on file in this office, dated August 24, 1863, be, and the same is hereby, accepted as far as it regards its general features, reserving the right to approve or disapprove any details of construction which may in any way affect the interests of the lesees of water-power; and that while the work of construction may be commenced at any and all points below Third street, there shall be no work done above Third street until further examination, with a view to settling details.

Yeas: Torrence and Gamble.

Copy certified.

Wirth, 23, 24.

The witness Wirth proceeds as follows:

In 1866 the committee of council agreed to build the main sewer by day's work, and employed Clement Dare, an engineer, to superintend the work. It was found impossible to construct the sewer below lock No. 7 (heretofore called No. 4) without turning the water into the old Deercreek sewer west of lock No. 7, and it was so turned.

The building of Fox (cotton factory) was partly on the 19 feet condemned. There was nothing done towards building the sewer until 1866. They had to get the water out of the way of lock No. 7 in order to do the work. Had to clear out the Pearl street lock in order to build the sewer. (This is lock No. 8.)

The Pearl street bridge fell while they were excavating for sewer, on account of quicksand.

There never were any plans submitted to the board of public works for the improvement from Third street (lock No. 7) except the original plans sent by Gilbert, as engineer.

The intention was to carry the water right into the sewer at Third street.

The sewer was all built to Third street while witness was in office.

We intended to build a race-way from the machine works to near Pearl, so as to comply with Miami Machine Works contract.

Wirth, 24.

After this Mr. Forrer, the State engineer, told me it had been made a question whether the Fox power had been legally forfeited, and that we had better carry the tail-race from where we intended to turn the tail-race into the sewer to Fox's power, and we made a contract with John Boyle to build the tail-race to that power, when we were stopped by an injunction. I think if we had built this race as proposed we would have given Fox as good a power as he had before.

On cross-examination he stated: I was assistant engineer in 1863. I made the survey, and Mr. Gilbert wrote the letter to the board of public works. We commenced numbering from the river, instead of from the upper locks.

It was intended to protect the rights of lessees of water-power. We were subject to the orders of the board of public works. Before the board of public works were to act, the board of city improvements were to furnish plans and specifications. We did not protect Fox's power, because we supposed there was none.

The engineer of the board of public works suggested that, inasmuch as the cost would be trifling, that we had better carry the race-way to the Fox power.

We were compelled to build a tail-race from lock No. 7 to Pearl street, because we had made a contract with the Miami Machine Works.

I knew when I made the survey that Fox received his power from lock No. 8.

The water was only turned off temporarily at Third street, lock No. 7, while we were doing the work.

25. If we had carried out our first plan it would have destroyed the Fox power.

45 In 1867 we, at the request of the board of public works, intended to build a race-way to protect Fox's water power, and had made a contract to do so, but were stopped by an injunction sued out by the Miami Machine Works.

Wirth.

On cross-examination the witness stated he knew of the condemnation proceedings; did not know what property they took.

Always heard it was the Fox power. The city made the change in the plans.

Paper H (pages 108 *&* 109.*)*

Contract between the city and the Miami Machine Works, 17th June, 1867.

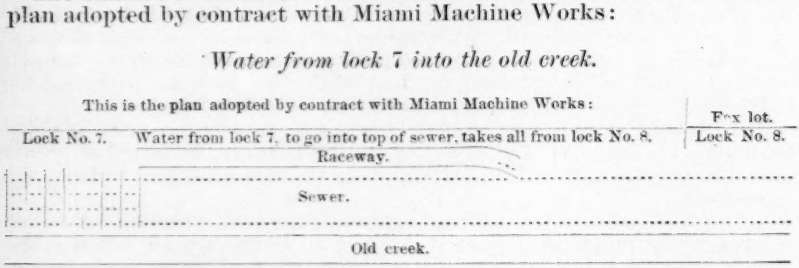
Contract to stop water from lock No. 7 descending to lock 8.

The said city agrees to construct the main sewer so as to allow the tail-race from said power (lock No. 7) to pass into the sewer at the top, giving to the said machine works co. the full head of water they are entitled under leases from the State of Ohio, viz, eleven (11) feet between the two surfaces, over which the water passes to and from the water-wheel, or else to conduct the water after leaving said power through not less than a six feet sewer, the centre of said tail-race sewer to be not less than eleven feet below the surface of the head-race, with

suitable descent below to such point in the main sewer near Pearl street at lock No. 8 as will enable the water to pass into the main sewer at the top.

The balance of said contract does not relate to this case. This is the plan adopted by contract with Miami Machine Works:

Water from lock 7 into the old creek.



CITY OF CINCINNATI *vs.* CHARLES W. WOOLLEY, CHARLES FOX, AND others. } Proceedings to condemn property.

So much of the record in this case reads as follows, January 7, 1865:

D. 76. "We also find that Charles Fox's lots Nos. 18 and 19 should be paid as his full compensation if he owns the 19 feet of ground between the centre of the avenue and his ground described in the petition. But if he is not the owner of said 19 feet, then his full compensation should be only $2,875."

Afterwards, in the same term, this entry is made: "And has (the city) also agreed with Charles Fox and Alphonso Taft, other defendants in the same case, to them the sum of three thousand ($3,000) dollars to said Fox and $4,000 to said Taft, respectively, instead of the sum found due in said verdict.

"Charles Fox to have the privilege of removing and using the stone and materials on his lot, and not prejudicing his use of the water-power on said premises."

E. 78. To carry out this order, Fox & Longworth, executors, on the 21st of November, 1865, deeded the said 19 feet to the city, subject, however, to the reservation of the right to take down the walls now standing on said premises and the stone standing on said premises, and using thereof in rebuilding walls and foundations on the remaining part of the lot hereby granted, and without prejudice to right to the tenant and assignee of the water-power used in said lot of conducting to and using said water-power on said lot.

R. C. Phillips (pages 10 to 14.)

R. C. PHILLIPS was then sworn, and testified:

I first became acquainted with water-power at lock No. 8 about 1843. When I first knew that property there was a large frame building on it. In that there was a large overshot water-wheel. Back of that building was a frame building that I used as foundry and machine shop. The lower end of the lock was below Pearl street. The water was carried down on the east side of the canal in a forebay.

The first floor of Geisendorff's mill was above high water. It would cost no more now to put the water-wheel there than it did then. I have general knowledge of use of water-power.

I put up steam-engines when I was using this power of Fox's, and used steam in connection with water. I think Mr. Fagin's statement is about correct as to the value of water-power.

The water-power was obstructed about sixty or ninety days in a year by backwater.

46 Cross-examination:

On cross-examination he stated:

I did not state Fox was damaged $1,800 per year.

My estimate is based without regard to any building. From my experience, Mr. Fagin's statement is about right. The lock gates, in 1863, were out of order.

After the destruction of Geisendorff's building the water-power was left to go to waste. There was no navigation after 1860, I think. The first official connection I had with the canal was in 1869. I prepared plans, as the city engineer, and gave stakes for building the works and race-way from Kilgour's, No. 7, to Fox's water-power, No. 8. The work was stopped by injunction. There is a connection made, running from Fox's tail-race into the sewer. Made head-race of Fox's power the tail-race of Kilgour's power. This would have given Fox as good a power, if not better, if we could have built the race-way.

Don't know what Geisendorff's expense was in putting up his building. The bed of the canal is about forty feet below Pearl street.

Would have first floor of building even with Pearl street. There has been no building put there since the fire. That property has been taken by the railway. I have been civil engineer twenty years. Have not run water-power or machinery since 1853.

In 1869 the canal water was run across the canal into the old sewer west of the canal, at Third street, No. 7, and turned into the canal again below Pearl street. We could not build a flume. It was impossible.

It would cost as much to build a temporary race-way as a permanent race-way. It would cost about $22,000. There was no building there to use the power, and seemed to be no immediate necessity for carrying the water down.

The difference between the level of the head-race and the bottom of the sewer was about fourteen feet. It would not be possible to turn the water in at Third street, lock No. 7, and preserve the Fox power.

On re-examination, witness said:

I made an estimate for carrying water down to lock 8 when I was engineer. I made another estimate, and concluded it would cost $22,000. City made contract with Boyle to build race-way to Fox power. There was no immediate use of carrying water there, as there was no building there.

The building to use steam would cost a great deal more than a building to use water.

There has been no water at lock No. 8 since the city commenced building Eggleston avenue sewer at lock No. 8.

The plans I made for the race-way, and which were approved by board of public works, were made in 1869. If we had carried the water and put it in the top of the sewer it would have destroyed Fox's power. We were ordered to preserve the Fox power by board of public works and the city council.

Have been civil engineer for twenty years. Was engineer connected with building of Eggleston avenue. I know of no rules to determine value of water-power, except by comparison with steam. I think the

annual value of the water-power would be from $6,500 to $7,000 a year, less the loss of time for ninety days, from backwater.

Recross-examination:

On recross-examination he said:

That is the value of the power, if used; if not used it is not worth anything. Don't think Fox was injured any more by city turning the water off than in letting the water run through the locks.

On re-examination, he said:

From 1866 Fox could not use the water-power. After city had taken possession of the avenue, it was impossible for Fox to run the power or use it. The race-way could have been completed in about a month. The plans were approved by the board of city improvements, and was approved by board of public works. The purpose of building the race-way was to furnish a tail-race for lock No. 7, and also to preserve the Fox power. $10 or $20 would have repaired the locks.

47 *Paper C.—Lewis Fagin's deposition.*

The plaintiff also read the deposition of LEWIS FAGIN, as follows:

Q. Please state your age, and what business you have followed and how long, and in what place or places.

A. My age is 67; my occupation has been for 34 or 36 years the manufacturing of flour. I have been engaged in machinery ever since I was in any business. I commenced the flouring business at lock No. 6 on the Miami and Erie Canal, at Cincinnati, in the fall of 1838. I followed the flour business at that locality for about 25 to 27 years. I went to Newark, N. J., and put up a large flouring mill there capable of making 1,600 barrels of flour in twenty-four hours. I continued at that for about five years, and now I am engaged in a steam flouring mill at Vincennes, Indiana.

Q. State whether during the time you have been doing business you have used water or steam power, or both, to run mill-stones for grinding wheat; if yes, where.

A. When I first commenced milling at lock 6 it was with water-power, and I afterwards added steam. I used steam for about twelve of the last years I carried on business there, in connection with the water-power, and steam alone at times.

Q. Please state whether you are practically acquainted with the cost of running a water-power of six run of stones for twelve hours in the day at the locks on the Miami Canal at Cincinnati, and what it costs to run the same number of stones, for the same purpose and the same time, by steam.

A. My experience in milling on the canal has been with three run of stone of water-power, running twenty-four hours, and the use of steam running twelve hours, and twenty-four hours—sometimes we would run half time and sometimes full time. The comparative cost of propelling a mill by steam-power shows, in my experience, that it costs about $1,800 per annum a run of stone more with steam-power than with water power at lock No. 6, where I operated, running twenty-four hours.

Q. State whether you are acquainted with the water-power at lock No. 8 on the Miami Canal, claimed by the plaintiff, and how long you have known it. How has the water-power been used at that lock, and by whom, since you have known it? What kind of water-wheel was used by J. C. Geisendorff while he ran the cotton factory at that lock, and how high his first floor was from the canal, whether above or below high-water mark?

A. I am acquainted with the water-power at lock No. 8 on the Miami Canal, claimed by plaintiff. I have known it about thirty-five years. My recollection of the first use of the water-power was by a saw-mill, by a man by the name of Thompson. The next occupant of the power, according to my recollection, was Mr. R. C. Phillips, who carried on a manufacture of scales, and a foundry. The next occupant was J. C. Geisendorff, who carried on a cotton factory. Mr. Geisendorff was there a great number of years, and until it burnt out, and he added steam to the water-power.

The first wheel Mr. Thompson had there was an overshot wheel, and when they put up the new building Mr. Giesendorff used a turbine wheel. The first floor or working floor was above high-water mark.

Q. What was the yearly value of the water-power of six run of stone, for twenty-four hours per day for grinding, at lock 8, from 1864 to 1871, per run, supposing there was no backwater to interfere with the running?

(Objected to by att'y for def't.)

A. I consider that there is only one way to arrive at the value of a water-power, and that is to compare it with the cost of steam-power. It would cost eight or nine thousand dollars a year to supply a steam-power equal to six run of stone of water-power, for twenty-four hours each day.

Q. Please state how long during the year did the backwater from the Ohio River interfere with running the mill at lock No. 8.

A. Some years it would not interfere with it at all; some years it would very materially interfere with it. On the average, I think it would not interfere with it more than three months, if that.

Q. With a water-power of six run of stones located at lock No. 8, as it has been used since you have known it, state your opinion of the propriety of erecting a new mill for a flouring mill upon the same ground occupied by J. C. Geisendorff. Would it, or would it not, justify the expense of erecting such a mill at that place and using the water as it has heretofore been used there?

A. If I wanted to build a large mill in Cincinnati for merchant work that would justify the addition of steam to keep it going during the three months that the water-power was interfered with by inundation, I would not hesitate to put it on that ground.

Q. What difference would it make, if any, in the cost of a suitable building to grind by turbine wheel water-power, and one to grind by steam-power?

48 A. I can see no material difference in the cost of the building. If anything, I think it would cost less to put it up to use a turbine wheel than it would be to use steam. With steam you have the boiler houses and stack, which are pretty expensive structures, which you would avoid by using the wheels.

Q. Please state how many barrels of flour can be manufactured with the power of six run of stones at lock No. 8 in twelve months, in twelve hours, and in twenty-four hours, running each day, when there is no backwater to interfere?

A. A six-run water-mill on the canal, with eleven feet head and fall, as in the locks 8 and 9, is able to make forty to forty-five thousands barrels of flour in a year. Might run up to fifty thousand in twelve months, running twenty-four hours each day.

Q. Please state whether these statements made by you are founded on actual calculations made by you in your business of manufacturing flour by steam and water, or are they mere impressions?

A. The statements I have made are based upon, as near as I can come at, on actual transactions, by paying out the money. If I was to go to my books, I could tell you precisely what it would cost to make a barrel of flour, running twenty-four hours a day.

Q. Please state whether you do or do not own taxable property in Cincinnati.

A. I own property in Cincinnati from which I have an income, which is taxable property.

Cross-examination:

Q. State whether or not you considered, in your previous answers as to the value of water-powers, the rents to be paid therefore.

A. In the comparative costs my estimates were made in the extra cost of steam over water-power after the water rents are paid. The cost of the water-power is charged up to steam, and deducted from it to show the difference.

Q. State whether you would change your opinion as to the value of one run of stone, if water-power with one run of stone were for sale for less than $1,800 per annum?

A. As to its real value it would not change my opinion, no matter what I could buy it at.

Q. Are you now using water-power at Vincennes?

A. No, sir; using steam-power.

Q. When were the gates at lock No. 8 repaired last time?

A. I could not state that; it has been a good many years ago.

Q. Was it prior to 1863?

A. Yes, sir.

Q. What was the condition of the gates in 1863?

A. In a very dilapidated condition, according to the best of my recollection.

Re-examination:

Q. Please state about how much coal it takes to grind a barrel of flour at your steam mill in Vincennes, Indiana?

A. A fraction over a bushel of coal, running night and day.

LEWIS FAGIN.

Edw. Connolly's testimony.

EDWARD CONNOLLY was also a witness, and testified as follows:

My business is manager of the city paper mills. We run by water and steam both. Have three run of stone. I made a calculation some two years ago of the cost to raise steam by coal. I have practised running machinery by steam and water power. I can't state from memory what it costs. I made a statement on former trial and left it with Mr. Jordan. That being handed to witness, he said: The amount of water is estimated at twenty-five horse-power. My estimate is six pounds of coal per hour to produce one horse-power. Three run of stone is estimated at twenty-five horse-power. The estimate for repairs is put in at 15 per cent. on original cost. Cost of two engineers, at $2.50 per day. Pay water rent, $166 a year; run four boilers, equal to one hundred horse-power. Water rent would be one-fourth of $166. Estimate is made on base of 18 cents for coal. It costs for one-horse power of water, per year, $41.30. By steam it costs $195.45. Difference $154.15.

49 My estimate is based upon 8½ horse-power for one run of stone; for six run of stone, fifty horse-power.

On cross-examination he said:

We ran machinery with our engine. Have run engine, taken it apart and put it together. Had an engineer to help me make my estimate. First ascertain cost of engine. Get boiler best adapted to this section of the country. Considered an engine such as is in general use. Estimated first, engine and fixtures complete, and next oil.

There is a great difference between firemen. It is the superintendent's duty to watch the men.

In making estimates it is necessary to take into consideration the quality of the coal and machinery, and the kind of men employed. Sometimes the quantity of water is reduced in cold weather by ice. Don't know what effect backwater has on water-power near the river.

Jos. Bell's testimony.

JOS. BELL also testified as follows:

My business is steam engine and machinery building. Have been engaged in machine business since 1847, at Third street and Eggleston avenue. It was then firm of Lyon & Bell.

In 1863 I went in with Charles Kilgour, and have been there ever since. We have tried running machinery by steam and water at Miami Machine Works, lock No. 7. The difference in running steam and water at lock No. 7 is about $10 a day. That is according to price of coal; sometimes more, sometimes less.

Have always known the cotton factory lot and water-power at lock No. 8. Backwater interferes with turbine wheel at lock 8 about three or four months in a year.

On cross-examination he stated:

Lyon & Bell continued from 1847 to 1858. After that Chas. Kilgour. Have been there since 1863, as superintendent and manager of Miami Machine Works. I never worked in Geisendorff's mill.

When the city commenced work on Eggleston avenue, the gates at lock 8 were pretty much down. There was no building there, but the walls were standing. I think the wheel and part of machinery was there in 1863. They threw the water into the old sewer opposite our race-way. The wheel could not have been used at that time, at lock No. 8. The water now runs down Eggleston avenue. I don't recollect when the water was turned into avenue sewer.

They turned it into the avenue sewer as soon as they could. The gates were out of repair before 1863, and were in bad condition when the city took possession.

There are three run of stone on east side, and three on west side of lock No. 7. There was a contract with the city to make a race-way to carry off the water from lock No. 7. They changed the water of three run of stone from the west side to the east side of the canal. I am at Kilgour's place now.

And thereupon the plaintiff offered in evidence the deposition of JACOB GEISENDORFF, a copy of which, marked F, is hereto attached and made part of his bill of exceptions. To the reading of part of the questions and answers thereto contained in said deposition the defendant objected as incompetent. The questions and answers so objected to are numbered as follows:

(Direct questions number 4, 5 and 6 were objected to as incompetent, and ruled out.)

The cross-questions propounded by defendant's counsel, numbered 1, 3, 4 and 5, were read, and 2 and 6 were withdrawn by defendant, and

the plaintiff claimed the right to read them, but the court ruled otherwise. The direct questions 4, 5 and 6 were also ruled out as incompetent; and the questions and answers to the same, and cross-questions and answers to the same, above numbered, were, on motion of defendant's counsel, ruled out and not allowed to be read to the jury.

To which overruling said questions and cross-questions, and not allowing them to be read to the jury, the plaintiff, by his counsel, excepts, and prays this his bill of exceptions may be signed, sealed, allowed, and made part of the record; which is done.

[SEAL.] CHAS. C. MURDOCK.

And the balance of said deposition was read to the jury. Said deposition is hereto attached, marked F, and made part of the record.

50 And thereupon the plaintiff offered to read the second deposition of Jacob C. Geisendorff, taken on the 2d day of October, 1873; and the counsel for the plaintiff offered the reading of such parts of the said depositions as the questions in the direct examination, numbered 1, 2, and 4, and the answers thereto; and the court excluded those parts of the depositions from going to the jury; to which decision of the court, overruling said questions and excluding the same from going to the jury, the counsel for the plaintiff excepts, and prays this his bill of exceptions may be signed, sealed, allowed, and made part of the record; which was ordered.

[SEAL.] CHAS. C. MURDOCK.

Which last deposition is hereto attached, and marked G, and made part of this bill of exceptions.

The first deposition, marked F, reads as follows:

Deposition F.

Question 1. Q. Please state whether you ever carried on any business on a lot fronting on the south side of Pearl street, and on the east side of Miami Canal, in Cincinnati, at lock No. 8. If yes, what business did you carry on there, and for how long a time?

A. I did carry on business there; I carried on the cotton and woolen manufacture there from 1844 to the 9th of October, 1855, until the mill burnt down.

Question 2. Q. State whether you erected any buildings on the lot, and at what expense or cost. State what machinery was in the buildings in October, 1855; describe it as fully as you can. State whether that machinery was propelled by water-power or by steam-power, or by both; and if by water-power in one part of the year, and steam-power in another part of the year, state what portions of the year by water and what portions by steam.

A. I erected a building in the years 1849 and 1850, forty by a hundred and twenty, being five stories in height, at a cost of between $14,000 and $15,000. I filled it with cotton machinery; it contained at the time of the fire forty-eight batting cards, five sets of cards of six each, six cards to the set; and all the drawing and spinning machines necessary to spin up the production of these cards, besides one or two hundred braiding machines to braid the material into star candle wicks, and ten looms for seamless sacks, besides lappers and pickers, and other preparations. The machinery was propelled at certain seasons of the year by water and at others by steam power, and part of the time by steam and water in connection.

About three-fourths of the year by water, on an average, and the other fourth by steam, and by steam and water, as it happened. When the backwater from the Ohio River interfered, we were compelled to run by steam.

Question 3. Q. When you were running by steam, what sized engine did you use? How many horse-power was it rated at? How many hours in the day did you use the engine? Did the engine, while running, exert the same power, or more, or less, than the water-power at lock No. 8? If you used any water-power at that lock, and upon the side of that lot, state of whom you leased it; and upon which side of the lot was it used or applied. How much of the west side of the lot did it occupy for its head-race, and for the wheel on which its power was applied?

(Objected to by the attorney for defendant.)

A. When running by steam I used a double cylinder engine of the capacity of a full hundred horse-power. I used the engine twelve hours in the day; also, the water-wheel, when in use, was used the same length of time. The water there, at lock No. 8, would exert fully as much power as a one hundred horse-power engine when there was no back water. It was on the west side of the lot and adjoining the canal that I used the water-power; and I leased it from the State of Ohio. The power was first leased by the State of Ohio to Clarke Williams, and by him assigned to Charles Fox, and by him assigned to me, and by me to Charles Fox again. The strip was between fifteen and twenty feet wide, as near as I can recollect, running from Pearl street to the back of the lot; that is, the strip occupied by the head-race.

(Objected to by the attorney for defendant.)

Question 4. Q. State whether you can tell what your coal, to run the engine above mentioned, cost you per bushel; and how many bushels were necessarily burned per day, of twelve hours, for engine and labor, while running; and how much it cost for necessary repairs and other expenses over and above the repairs and expenses attending the use of the water-power.

(Objected to by the attorney for defendant.)

A. My coal cost me from nine to twelve cents per bushel, and I was using two hundred bushels per day, of twelve hours. The cost depended upon the fluctuations of the price of coal at the river. The cost of labor and oil and packing to run an engine would cost, of an average, from $4.00 to $5.00 per day, of twelve hours.

51 Necessary repairs of running an engine: The repairs on the engine and boiler would average $500.00 a year, having two boilers 26 feet in length by 42 inches in diameter, each boiler containing two flues about 15 inches in diameter; this was over and above the repairs and expenses attending such use of the water-power. The turbine water-wheel used there was, as near as I can tell, about sixty inches in diameter.

(Objected to by attorney for defendant.)

Question 5. Q. Please state whether the use of said water-power of lock No. 8, during the portions of the year you could use it to run your machinery, saved you any cost of fuel and labor in the twelve hours a day you used it during the year. If yea, please state what amount of money you saved in the course of the year by using the water-power instead of steam-power. In other words, how much per year was the water-power worth to you at that lock, for that period of the year in which you could use the water-power, twelve hours every day?

A. I have already stated the saving of the cost of fuel by the use of water-power, and the repairs; and, in addition to that, there is an additional loss by running the engine, from the fact that it gets out of repairs and causes many stoppages which is avoided by using water—the loss of time caused by repairs necessary to be made on the engine and boilers.

In running a year, in running water and steam, would be a loss of at least between fifteen hundred and two thousand dollars a year in a cotton mill the size I was running at lock No. 8.

That water-power there was worth to myself, or any other man who would put it to full use, $60,000.00. It is worth more than that to-day if it could be had, being six run of stone, and would manufacture one hundred bushels per day to the run.

We have used here at our flour mill, under the firm name of Geisendorff, Richardson & Co., an engine running on an average two burrs, and part of the time using water to assist it, about six months—that cost, as near as I can remember, $5,000.00 for labor, repairs, and fuel for the six months; that is, running the twenty-four hours per day for six days in the week.

We have a water-power here that will run five run of burrs two-thirds of the year. The company of outsiders keep up the embankment and repairs for about three hundred dollars a year, which is all the cost to us. We average our full eleven feet fall when we are in full blast; we manufacture about two hundred and twenty-five barrels in twenty-four hours.

Question 6. Q. Please look at the papers now shown you, marked "A," purporting to be an agreement between the board of public works of Ohio and yourself, and also an assignment thereof, and say in whose handwriting the signatures Alexander P. Miller, acting commissioner, and J. C. Geisendorff, are.

A. The handwriting of the assignment is my own handwriting, and I received the agreement marked A from Alexander P. Miller, and know that to be his signature. According to the best of my recollection, up to the time I was burnt out, I fully complied with the terms of that agreement.

Question 7. Q. Please state whether when you built the foundation of your mill you consulted any of the officers of the canal as to the line of the building. If yea, did they agree or disagree to the line you have built upon?

A. I did consult with the officers of the board of public works, and they gave me permission to build the foundation as I did.

J. C. GEISENDORFF.

52 Cross-examination by counsel for defendant:

Question 1. Q. Were there any other interferences than those mentioned in the use of the water-power during your occupancy of the premises?

A. Nothing, only the breakages of the canal and the time for cleaning it out. Very little time was lost for breakage, but I believe about a month was taken, always, for cleaning the canal; a month every year, I mean.

Question 2. Q. (Not very distinct.)

A. The supply of water at lock No. 8 is sufficient to run three forty-inch Leffel turbine wheels, each exerting power under eleven foot head of water of forty (balance not legible).

Question 3. Q. Did you have the same force when using the water as when running by steam?

A. Yes, sir; we had fully the power, and more desirable than steam.

Question 4. Q. Why did you keep an engine to supply the time not occupied by water-power?

A. Because we wanted to run when the backwater from the river stopped us, and when they let the water out of the canal to clean it.

Question 5. Q. Was your power as valuable as the powers above you on the same canal?

A. It was just as much less valuable as the backwater caused stoppages. Some years more valuable, because the backwater was not so troublesome.

Question 6. Q. What was the value to you during the year, while you used it?

A. The difference between the cost of using water-power and steam-power. While I run there would be between six and seven thousand dollars outside the repairs on the engine and boilers in favor of the water-power.

J. C. GEISENDORFF.

J. C. Geisendorff's second deposition, in answer to the following interrogatories by plaintiff's attorney, marked G:

Question 1. Q. Please state whether your deposition has been heretofore given in this case. And, if yea, at what time?

A. Yes; about the 11th of May, 1871.

Question 2. Q. Please state from your knowledge of the use of the water-power at lock No. 8 on the Miami Canal, as testified to in your former deposition, the actual value of the use of the water-power per year as a motive power to run six run of mill-stones from 1864 until the present time.

A. I consider it worth at least six thousand dollars per year, including all stoppage on account of backwater. I mean for the water passing lock No. 8 prior to 1864.

Question 3. Q. State how much such water-power would be worth per year as a motive power to run other machinery than mill-stones.

(This question objected to by defendant's attorney.)

A. It was worth fully as much for any other purpose that water-power could be used for.

Question 4. Q. State what would be the annual cost of running a steam-power of the same extent as the water-power at lock No. 8 from 1864 until the present time.

(Question objected to by defendant's attorney.)

A. I cannot say exactly; but I think it would be in excess of six thousand dollars.

Cross-examination by defendant's counsel:

Question 1. Q. State whether or not you have been doing business in Hamilton County, Ohio, within the last ten years.

A. No, sir; I have not.

Question 2. Q. State whether or not you know the market value of water-power in Cincinnati at the present time, or whether you knew the same at any time since 1864.

A. The price of coal will regulate the market value of power. I do not know of any sales since 1864 of water-power in Cincinnati.

Question 3. Q. State how much of an investment would be necessary to utilize the powers at said lock No. 8.

53 A. I do not know the condition of lock No. 8 now; therefore I cannot say.

Question 4. Q. If said lock No. 8 is in a similar condition to that in which you left it in 1855, how much of an investment would be necessary to utilize the water-power at said lock?

A. To put up buildings and machinery for a cotton factory you can use from thirty to sixty thousand, for a flouring mill it would take twenty-five to forty thousand dollars. It depends upon what machinery and active capital are to be used.

Re-examination by attorneys for plaintiff:

Question 5. Q. State what the cost of the turbine or Leffel wheel and the upright shaft to communicate power to the machinery of the mill would be.

A. A Leffel wheel and shafting for a mill with eight run of burrs would cost from twelve to fifteen hundred dollars; I cannot tell exactly.

J. C. GEISENDORFF.

54 Question 14. Q. Please state whether, when you built the foundation of your mill, you consulted any of the officers of the canal as to the line of the building. If yea, did they agree or disagree to the line you have built upon?

A. I did consult with the officers of the board of public works, and they gave me permission to build the foundation as I did.

J. C. GEISENDORFF.

And thereupon the defendant read in evidence the contract between the Miami Machine Works and the City of Cincinnati, marked H, which reads as follows:

Paper H.

This contract, this day entered into between the City of Cincinnati and the Miami Machine Works Company, witnesseth:

First. That the Miami Machine Works Company hereby abandons their right to use the water-power (three run) on lot No. 38, Baum's subdivision, on the west side of Miami Canal, transferring and using the same on the east side of said canal.

Second. In consideration of said abandonment and transfer, the City of Cincinnati agrees to construct under said contemplated Eggleston avenue, at such point as the Miami Machine Works Company may designate, a suitable stone archway, ten feet in width in the clear, and ten feet in height, placing the same as near the grade of the street as practicable, but not at a less distance than seven (7) feet from the said grade, connecting the brick building on the east side with the frame foundry on the west side of the canal, so as to carry the power across the intervening space with a shaft, as the same is now done; said archway to be built when the street is permanently filled up; and the said city grants the use of a tramway across the street, when completed, for the purpose of more readily transporting heavy castings and other materials between the buildings heretofore designated, as the same is now done.

Third. The said city agrees to construct the main sewer so as to allow the tail-race from said power to pass into the sewer at the top, giving to said Miami Machine Works Company the full head of water to which they are entitled under leases from the State of Ohio, viz: Eleven (11) feet between the two surfaces over which the water passes to and from the water-wheel, or else to conduct the water, after leaving said power, through not less than a six-foot sewer, the center of said tail-race sewer

to be not less than eleven feet below the surface of the head-race, with suitable descent below to such point in the main sewer, near Pearl street, at lock No. 8, as will enable the water to pass into the main sewer at the top.

Fourth. The said city agrees to build a suitable area wall, with covering for area (or coping and railing along said wall), not less than twelve feet from the face of the building along the east side of said avenue, abutting the property of the Miami Machine Works Company, as a conduit for the water, with a suitable tumble for the excess of water to pass into tail-race.

Fifth. The abutting property to be assessed for sewerage, not exceeding $2.00 per lineal foot, the same as other sewers.

Sixth. It is understood and agreed that the Miami Machine Works Company waives no right or claim they may have against the city by reason of the contemplated improvement, except as expressly herein provided.

In witness whereof the City of Cincinnati, by Thomas G. Smith, chairman of the committee of council on the Eggleston avenue improvement, has hereunto set her hand and seal, and the said Miami Machine Company, by C. G. Gove, treasurer, thereunto duly authorized, has hereunto set her hand and seal this 17th day of June, 1867.

[SEAL.] CITY OF CINCINNATI,
By THOMAS G. SMITH,
Chairman Committee of Eggleston Avenue Imp't.

[SEAL.] MIAMI MACHINE WORKS CO.,
By C. G. GOVE, *Treasurer.*

[5 cent rev. stamp, cance'ed.]

The defendant also introduced the following witnesses:

Henry Pearce's testimony.

HENRY PEARCE was then sworn as a witness for defendant. He stated he was engaged in a cotton manufactory at the corner of Fifth street and Eggleston avenue. Been using water-power over thirty years. Have six run of stone. Know of power at lock No. 8. It was used about 1838 as a saw-mill. It was afterwards used as a cotton-mill until between 1853 and 1855, when the mill was burnt down. After the mill burnt no use was made of the water-power. The walls were torn down. Gates at lock No. 8 were in bad order. From 1850 to 1860 the locks were in bad condition. Don't think boats went through
55 canal after 1857. In 1863 we wanted to build a batting-mill, and I went and examined the ground at lock No. 8, and made an estimate of the backwater and expense of putting up building.

From the knowledge I have of the power at lock No. 8, from 1863 to 1871, I think I have enough knowledge to state its value. I don't think power located so low down below high water has any value. Power at lock No. 8, from 1863 to 1871, I don't think had any value. Ground in that vicinity is worth about from one to two dollars a square foot. Power could be used on the northeast corner of Pearl street and the avenue, if high water did not interfere with it. Would cost more to build north of Pearl street than south.

Cross-examination.

On cross-examination he stated:

The extra excavation would be the difference. That Geisendorff

property is worth $200 a foot. Don't know what the lot could be used for, except as a mill. Cotton factory was run by turbine wheel. Would cost the same to use turbine wheel above Pearl street as below. If six run of stone could be used there, I don't say it would be of no value. If that power existed for nine months in the year, I think it would have some value. Never run six run of stone by steam. Our fall is a few inches short of eleven feet. Firm was allowed by city $1,500 for the four inches of water destroyed on moving our mill building. Our mill stands on the east side of the avenue. We took our mill down in 1868, and the city paid us $15,000, because there was danger of our building being undermined by building the sewer. We did not run all the time by steam. It takes one hundred bushels of coal a day at our mill. We have about one hundred horse-power engine. Have run a grinding mill. Had two run of stone. Was in council in 1858 and 1859. Pressure power will grind six hundred bushels of wheat a day.

On being examined by defendant, he said:

Had a cotton-mill in 1868. Estimated the water-power that they took from us at $1,500. Suppose the overflows are irregular. All Geisendorff's machinery was on the floor above high water. Backwater did not interfere with engine. Think G. made batting in the lower rooms. The water-power is worth more where there is a building. The water-power is worth as much to sell again. Don't know what our old building was worth. Our power is about the same as it was before the city took in Eggleston avenue. Think the liability of the State to take the water-power away has affected the value of water-power We use all the water-power we can.

Mr. Fells' testimony.

Mr. FELLS was also sworn, and testified as follows:

I live in the city; lived here thirty-four years; was superintendent of the Miami Canal for eight years, from 1851 to 1854, and from 1856 to 1871. Had to see to repairs of canal. Geisendorff's mill was between Pearl and Front streets. Mill burnt down while I was not superintendent. Canal was navigable up to the time my first term expired, 1854, for small boats. When I went into office the second time the locks were all out of repair. Navigation was stopped because Flagg's wall, between Pearl and Third streets, fell in the canal. The head-gates at lock No. 8 were closed. The tail-gates were unshipped, and were of no use. Nothing was doing with water-power at lock No. 8. When the river was up a certain height the mill could not be run. Sometimes Deercreek sewer would interfere with water-power at lock No. 8. Deercreek sewer intersected the canal a few feet above Front street. If the river was low the water from Deercreek sewer, in case of hard rain, would cause a backwater from the sewer, and would interfere with water-power at lock No. 8. Ice would interfere with water-power. Ice, after being broken, would sometimes gorge and stop the flow of water. Lock No. 8 would be interfered with by high water about six weeks or two months. In 1861 the head-gates were closed. Boards of the gates commenced rotting, and then the water passed through. Water-power at lock No. 8 was interfered with by high water between two and three months in the year.

Cross-examination.

On cross-examination he said:

It was my duty to see that the lock gates were in order. I kept them

in order as far as necessary. Had two gates made for lock 8, and left them on the canal when I quit, but did not put them in lock No. 8. I notified Longworth to move the wall. I made my report to the board of public works, and was ordered again to notify Longworth. I never received any further orders. The wall fell in 1856. It was never removed. The water got down by passing down the space west of where the wall fell. Could have preserved water at lock 8 by putting new planks on the gate. Water from old sewer would interrupt the power at lock No. 8 two or three days in a year. The interruption of the regular flow of water was from six weeks to two months. Mills don't stop on account of ice, but do not have as much water. Ice would be the same at all locks.

56 *Mr. Bateman's testimony.*

W. M. BATEMAN was also sworn, and said:

I am district attorney for the southern district of Ohio. Have been an attorney for twenty-two years. Was attorney for the State from 1860 to 1869. Was afterwards attorney for the lessees of the public works. Don't know when my attention was first called to the rents of lock No. 8. Was employed to ascertain what amount of delinquent rents were due. Found Geisendorff owned the power at lock No. 8. Had conversation with Judge Fox. Asked him where Geisendorff lived. Had two or three conversations with Fox. Think I stated to him why I wanted to know where Geisendorff lived. My best impression is that I told him G. was delinquent for the water rent. He told me, I think, that Geisendorff lived in West Virginia, but that he (G.) was insolvent, and that nothing could be made out of him. Fox did not tell me that he was owner of the water-power at lock No. 8. Think I had several interviews with Fox in regard to forfeiting the water-power lease. Don't remember of his having said anything in regard to his owning the power until after the passage of the act vacating the canal. I did not succeed in getting any rents. Gave directions to Messerole as to service of notice for the forfeiture.

Cross-examination.

On cross-examination he said:

I don't know what year the attempt was made to forfeit the lease. I think from 1866 to 1869. Don't remember of filing petition to forfeit. Think you (Fox) first came to me in connection with some interest you had in water-power. State proposed to sell the water-power to Kilgour. Don't know whether I was consulted in regard to right of State to sell. Am not certain that you told me G. lived in West Virginia. Was not informed that the lease had been transferred to Fox. Did not know that the board had reduced the rent of lock No. 8 to $300. Remember of telling Fox that the reducing the rent was void. Don't recollect of filing petition in September, 1864. Don't recollect when the conversation took place. Demand for rent was made June, 1866. Petition filed in 1868. Don't know how much rent was due. Don't remember what the delinquent rents were.

Recross-examination:

Don't know when I sued Clark Williams. I think I brought suit in 1869. There was no water-power below lock No. 8. The two locks below were given up by Williams and abandoned, and received by the State in 1861.

Mr. Erkenbrecher's testimony.

ANDREW ERKENBRECHER was also sworn, and said:

I own Bradbury mills, corner Broadway and Eighth street. Have owned water-power twenty-six or twenty-seven years. Know of sales of water-power. Have known power at lock No. 8 since 1844. I don't believe I can put a value on power at lock No. 8. Power is valued as it is used. Know very little about lock No. 8. The lower down, the less valuable the power. In former years we estimated a long level as more valuable than a short one. Has been no use of the power at lock No. 8. As far as I know, it remained in a dilapidated condition for years. There was no building, but don't know whether there is a race-way there or not. There was a race-way there for years. If I had a mill there, or anything to use the water, I would have thrown timbers across the abutment and built a dam there. I could not put an estimate on that water-power. Don't know how much below Pearl street the Geisendorff lot is. Think about forty feet. Don't think it would have been a good investment to put a building there. I would not have done it. It might have had some value for other purposes. Turbine wheel will run under water with diminished power.

Cross-examination.

On cross-examination he stated:

Consider water-power of value that runs all the year. Cannot state yearly value of water-power. The yearly value of water-power compared with steam is about $600 per year per each run. Run Bradbury mill by both water and steam. Are not using it as a mill now. Have sued the city for water-power. The premises are now used for grinding facing. Knew Geisendorff mill when he was running it. Don't think it was as valuable as other powers. Would not cost any more to build if the foundation was there. It is cheaper to build for water-power than for steam-power.

Isaac Greenwald's testimony.

ISAAC GREENWALD was sworn, and testified as follows:

I own a machine shop and millwright machinery works at corner Eggleston avenue and Pearl street. Been in the business there since 1857. Known power at lock No. 8 since first building was there. Nothing been done with it since the mill burned down. Race-way was there for a short time after the mill burnt. When the city took possession the water run through the locks. Have not made close estimate of value of water-power. Difference between steam and water is about $800 a year per each run of stone. I would not say that I know the value of power at lock No. 8. Don't think it was worth anything to anybody between 1864 and 1871. Engines were on floor above water-wheel.

57 Cross-examination.

On cross-examination he said:

Think the machinery was on the floor one story below Pearl street. He had batting machinery there. I saw mud on the floor after rise in the river. Would not require any longer shaft for wheel now than then. Don't say it was of no value. If building and water-wheel was there it would be of some value. I don't know what it requires to make a barrel of flour.

W. H. Messerole's testimony.

W. H. MESSEROLE was sworn, and testified as follows:

I am a canal collector. Have been collector since 1860. Rents were paid prior to March, 1853. There was no money tendered me for rent from 1860 to 1863. Book "A" shows a balance of rents due me of $1,154.93, May, 1854. Book "B," November 1, 1856, balance due $572.34. November, 1859, balance $572,34, carried forward. May 1, 1859, $150.00. Six months' rent to be added to $572.34; $600 omitted. Last account kept with this power is May, 1869. My office is No. 7 Canal street. (Report of the board of public works offered and refused.) I am employed now by lessees of board of public works. No tender was made prior to 1863. My office is always open during business hours.

On cross-examination the witness said:

I did not keep these books. The entries in these books show that charges are made at reduced rents, from 1854, of $150 for six months, instead of $225 for six months. All the accounts that I find are made at reduced rates. The reason the accounts were not transferred to book "C," which was opened and accounts kept therein in 1860, is because the State considered the water-power at lock No. 8 forfeited. Found books in the office when I took charge. Found rents charged up from 1855 to 1859 in books. Do not show any reduction to Fox for non-repair of locks. May 1st, 1855, by deficiency of water to 1850, $205. A. C. Horton, my predecessor, was there from May 9, 1859, to April, 1860. Fallis was there to May 8th, 1859. Entry made May, 1859, for six months' rent of lock No. 8; $150. Offers receipt to J. C. Geisendorff for notes given for water rent, dated November 1, 1853, for $1,060. Credit by note paid in Central Bank, August 18th, 1854, $350. I would think this entry meant that note had been paid. September 18th, 1854, paid by note, $350. October 18, 1854, paid by note, $350. Think payments were made afterwards. May 1, 1855, by deficiency of water prior to 1850, $205—page 33, book "B."

The defendant then read the deed from State of Ohio to City of Cincinnati, dated April 28, 1863, a copy of which, marked P, is made a part of this bill of exceptions.

Clement Dare's testimony.

CLEMENT DARE was then sworn, and testified as follows:

I am a civil engineer. Reside near Oxford, Ohio. Have had a great deal of experience with canals. I made plans for portion of Eggleston avenue sewer, and superintended the building of a portion of the sewer, from Fifth street to the river. I commenced work on the sewer in the summer of 1866, at the river. Next year commenced at Third street. Did work by the day in 1866. Carried work in 1866 to lock under Front street bridge. Water passed around by an artificial way that was constructed for it, at lock at Front street. Did not change water at lock No. 8, or above Front street, in 1866. Commenced work at Third street, lock No. 7, in 1867, and tunneled through to old Deercreek sewer above Third street, and let water run into old Deercreek sewer. Turned in water there May 10th, 1867. Turned water in so as to be able to construct sewer from Pearl to Third street, lock 8. I was doing the work in 1867. Contractor Boyle took charge of the work in August 8, 1867. Prior to that I had been doing it for the city. After Boyle took charge I acted as superintendent and engineer for the city.

party liable to pay the rent on the day the rent became due, and that the demand should be for the amount due.

CHARGE 8.—8. I charge you that if the State of Ohio did not, before the grant to the city of the Miami and Erie Canal, either forfeit the right of plaintiff to the water-power claimed at lock No. 8 by legal means, or in fact resume or re-enter upon the rights and privileges granted by said leases, that the city of Cincinnati took said grant subject to the right of Judge Fox to said water-power.

CHARGE 9.—9. If the jury find that the State of Ohio, in its books, charged for the rent of lock No. 8 up to May, 1859, and claimed that it was owing, this would be strong evidence that the State had not resumed the privileges granted by said lease, but still considered said lease valid and subsisting.

CHARGE 10.—10. I charge you that if you find that the State or its agents demanded payment of the rent at lock No. 8 for the six months preceding May 1, 1866, and claimed it was due, this then would be sufficient evidence to justify the jury in finding that the State had not resumed the rights granted by said lease, and that the same was, up to that time, a valid outstanding lease.

CHARGE 11.—11. To charge the jury that the mere non-user of the water-power, against the intention of the lessee not to abandon, does not amount to abandonment. An abandonment is not presumed, but must be proved and asserted to by both parties. The lessee has a right to hold, from a desire to sell at a remunerative price.

2 Rhode Island, 372.

Raritan Water-power vs. Veghte 6; C. E. Greene, 480.

Townsend vs. McDonald, 3 Kernan, 381.

CHARGE 12.—12. We ask the court to charge that the fact of the plaintiff not building a mill on the premises after a former mill on the premises had been burned down does not destroy the rights of the lessee to recover, as he may not be able to rebuild.

Mowry vs. Sheldon, 2 Rhode Island, 372, 374, 376, '77, and '78.

1 Seldon, 40.

17 Massachusetts, 296.

12 Maine, 409.

2 Washburne, 640.

CHARGE 13.—13. To charge that a mill privilege under the lease from the State to Clark Williams cannot be deemed extinguished or abandoned merely by a non-user of less than twenty years.

Taylor's Land and Tenant, sections 239 and 242.

Casler vs. Shipman, 35 New York, 542.

Hurd vs. Curtis, 7 Metcalf, 94, 115.

CHARGE 14.—14. To charge the jury that the doctrine of abandonment only applies to easements and not to leasehold estates held by grant.

Taylor's Land and Tenant, section 240.

Rose vs. Sedgwick, 35 Barbour, 329.

Snider vs. Hastings, 24 Barbour, 49.

CHARGE 15.—15. To charge that in order to constitute an express surrender, the surrender must be in writing and accepted by the landlord. A surrender in law may be implied by accepting a new lease. Acceptance of a surrender will not be presumed from mere lapse of time.

Taylor's Land and Tenant, sections 509, 512, and 514.

Van Rensalaer vs. Penniman, 6 Wendell, 579.

CHARGE 16.—16. To charge that so long as the tenant remained liable

to pay the rent stipulated in the lease, and the landlord did not see proper to forfeit the lease in a legal manner, the city of Cincinnati cannot set up any forfeiture of the lease as a defense to plaintiff's claim for damages.

Taylor, section 499.

CHARGE 17.—17. If you should in fact find that Judge Fox was largely behind in his rent at the time the city received its grant from the State—if you should find that the State or its legal representatives had not resumed the right granted by the lease to Williams, and had not taken other legal steps to forfeit his right, the right of Judge Fox to recover such damage as he may have proven will not be thereby cut off.

60 CHARGE 18.—18. If you find that the State had not in any way resumed the rights and privileges granted at lock No. 8, and that Judge Fox had a right to demand the water-power leased at said lock, and the State suffered the lock to so get out of repairs that it did not and was not able to deliver Judge Fox the water-power to which he was entitled at the time of the grant to the city, neglect and failure of the State would not release the State from its liability to furnish said water-power, and would not prevent the plaintiff from recovering such damages as he may show he has sustained.

CHARGE 19.—19. In order to recover damages by the plaintiff in this case, it is not necessary for him to prove that after the burning of the cotton factory at lock No. 8 he had an opportunity to sell the use of the water-power. But if, in the opinion of the jury, the water-power leased by the State to Clark Williams belonged to Charles Fox in the year 1864, and if it was of any value to said Fox for the use of a mill, or for rent, or to make a sale thereof, he is entitled to such damages as he may have sustained yearly by the delay of the defendant to restore the water to be used at lock No. 8.

CHARGE 20.—20. If you find that a written plan of sewerage was prepared by the board of city improvements of Cincinnati and presented to the board of public works for approval, which plan allowed the water rights and privileges of the lessees to remain, and said board of public works adopted the general features of said plan, but at the same time reserved the right to approve or disapprove of any details of construction which might in any manner effect the interest of the lessees of water-power, I charge you that such reservation of authority was legal and proper, and would authorize said board to reject and object to such mode of construction as would destroy or injure the right of Judge Fox or other lessees intended to be protected.

CHARGE 21.—21. I charge you that it was competent for the city of Cincinnati and the board of public works to make such modifications of the original plan as was reasonable and necessary to carry out the system of sewerage agreed on; and if they agree upon and adopt a plan by which the rights and privileges of Judge Fox, at lock No. 8, could and should be protected, it was legal and proper for them to do so, and the city of Cincinnati could not change said plan so as to destroy or injure the rights and privileges of Judge Fox.

And the court gave the first and fifth charges asked, but refused to give the nineteen other charges asked; to which refusal of the court to give those several charges as asked, the council for the plaintiff excepts, and prays that this his bill of exceptions may be signed, sealed, and allowed, and made part of the record; which is done and ordered.

[SEAL.] CHAS. C. MURDOCK.

And thereupon the court gave its charge to the jury, as follows:

Charge of Judge Murdock.

CHARGE 1.—1. GENTLEMEN OF THE JURY: The plaintiff, Charles Fox, claims to recover damages from the city of Cincinnati substantially for an injury to a water-power, of which he alleges he was the owner, at lock No. 8, in the city of Cincinnati, on the Miami and Erie Canal. He, in substance, says that in the year 1863 the State of Ohio ceded to the city of Cincinnati all that part of the Miami and Erie Canal lying between Broadway and the Ohio River, but expressly reserved from that assignment all water privileges which they had heretofore granted to certain individuals, and subject to the reservation made by the State that the body of water in the canal should not be decreased, nor the amount of water for milling purposes be interfered with. He alleges that he was the owner of a water-power at lock No. 8 sufficient for the purpose of carrying six run of stone; that he was the owner of it by assignment from one Geisendorff, who was the assignee of Clark Williams, who bought or had a lease, as they called it, from the State of all the water-power from Broadway to the river connecting with all these locks. He alleges that the city of Cincinnati took possession for the purpose of making an avenue, called Eggleston avenue, of that part of the canal ceded to it by the State, and that it interfered with his water-power at lock No. 8 to such an extent that he lost the use of it for a certain number of years, and he claims to recover damages for the value of that water-power for the number of years that he alleges the city prevented him from using it.

CHARGE 2.—2. The city, in substance, claims that he had no power. They admit the assignment to the city of such portion of the canal as is described in the petition, but they say that the power had long before been abandoned by the person entitled to it under the lease or agreement, as it may be called; that it had also been forfeited, that is, that the terms of the lease upon which the lessee held it had not been complied with, and the State had forfeited it. They allege also that they did not interfere with it. They allege, further, that by a proceeding to condemn the property, under the law permitting corporations, for the purpose of making improvements of a public nature, to condemn property for that purpose, if plaintiff had any right it was cut off and ended by that proceeding. They also claim, I believe, in effect, that when the assignment was made to the city the plaintiff had so conducted himself about the power which he alleges that he owns as to make any one taking any rights from the State believe that he had none, and that they acted upon that belief and are in fact innocent purchasers or assignees, and that therefore the plaintiff cannot assert his right, if any he has, against them.

61 These are all the defenses set up to the claim of the plaintiff. The plaintiff replies to this answer, and denies all allegations which are inimical to his rights set forth in his petition.

CHARGE 3.—3. In order, gentlemen, to enable you to come to a correct conclusion upon the evidence in the case, it is necessary for the court to instruct you in regard to the law governing the rights of the parties in this case; and, in doing so, it becomes necessary for the court to construe the act ceding the Miami Canal to the city by the State; to construe the lease from the State to Clark Williams, under which the present plaintiff claims; to construe the law under which the lease was made, and also to construe the lease.

CHARGE 4.—4. Before proceeding further, I ought to state that the city of Cincinnati, in addition to its answer filed here to the claim of the plaintiff, by what we lawyers call a cross-petition, brought in another party, alleging that he was a necessary party to the full and complete adjudication of the points involved in the case, and praying for certain relief to that party.

A demurrer was interposed on the part of the third party, who is the Miami Machine Works, and the demurrer was sustained and the party dismissed; so that, so far as any rights to that party are concerned, they are not before the jury. They are not involved in this controversy, and you have no personal rights to consider other than those of the city and Charles Fox.

Allusion has been made time and again, and you have heard me deprecate it, to Charles Kilgour. I think it not out of place to say that that gentleman's name has figured extensively in the newspapers; and whatever odium may be attached to it—and we don't know or say that any is or ought to be attached to it—is not to be used in this case to prejudice any party in this case.

CHARGE 5.—5. The State made a lease, as it is called in some parts of the instrument, to Clark Williams, in 1836, of all the water-power between Broadway, in the city of Cincinnati, and the Ohio River. Whatever terms may be made use of by the State in this lease or instrument, in drawing it, and the party in accepting it, they must be construed in reference to the language of the statute, giving the power to make this instrument, whatever it may be called.

By the terms of the law of 1830, the State was authorized to make leases, or, in substance, to sell all the surplus water not needed for navigation in this canal. That is the general law. In another section of the statute—for fear, apparently, that it may not include what is called the waste power that runs around the locks—it is extended to the water called the waste water, carried around any of the locks in the canals of the State. And that, gentlemen, as I understand it—and I believe I am not usurping any province of the jury in any way to tell you what are the facts as conceded by all parties—that the water-power spoken of is the water that runs around the locks. Some people call it the waste way, and I call it that. Whether this is the technical term, I don't know; but it is the water not needed for navigable purposes, and that by law is expressly embodied in this statute.

I will read the section of the law which gives the power to sell the surplus water, and that portion of the law which particularly applies to the water-power in this city:

"SEC. III. That whenever, in the opinion of the board of canal commissioners, there shall be surplus water in either of the canals or in the feeders, or at the dams erected for the purpose of supplying either of said canals with water, or for the purpose of improving the navigation of any river, and constructed at the expense of the State, over and above the quantity of water which may be required for the purpose of navigation, the said commissioners may order such surplus water, and any lands granted to or purchased by the State for the purpose of using the same, or such part thereof as they may deem expedient, to be sold for hydraulic purposes, subject to such conditions and reservations as they may consider necessary and proper, either in prepetuity or for a limited number of years, for a certain annual rent or otherwise, as they may deem most beneficial for the interests of the State.

"SEC. IV. That the provisions of the foregoing section shall extend

and include the water passing around the locks from one level to another, on either of the canals of the State.

"SEC. V. That no hydraulic power or right to the use of any water shall be sold, leased, or conveyed, except such as shall accrue from the surplus water of the canals, feeders, or dams, or from the water passing around any lock, after supplying the full quantity necessary for the purposes of navigation.

"SEC. VI. That every lease, grant, or conveyance of water-power shall contain a reservation and condition that the State or its authorized agents may, at any time, resume the privilege or right to the use of the water, or any portion thereof, whenever it may be deemed necessary for the purposes of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with and injuriously affect the navigation of either of the canals, feeders, or streams, from which the water shall be taken for such hydraulic purposes; and, whenever such privilege shall be resumed in whole or in part, the sum paid therefor, or rent reserved, or such reasonable portion thereof as shall be determined upon, agreeably to the conditions and stipulations of the lease or deed of conveyance aforesaid, shall be refunded or remitted to the purchaser or lessee, his heirs or assigns."

62 So that all the terms and expressions contained in any instrument, which the authorized agents of the State might make under that law, must be construed with reference to it, and cannot be enlarged or extended beyond the power given to them by this act of the legislature.

Now, it is claimed, and perhaps conceded, that on the 26th of March, 1836, the State of Ohio, by its properly authorized agents, made a lease to Clark Williams of all the surplus water from Broadway to the Ohio River. Subsequent to that, Williams assigned the power at lock No. 8, sufficient for six run of stone, to one Geisendorff; the lease specifiing six run of stone as the power at this lock. It is claimed that Geisendorff assigned to the present plaintiff in this case.

CHARGE 6.—6. In 1863 the State of Ohio ceded to city of Cincinnati all that part of the Miami and Erie Canal from Broadway to the Ohio River, for the purpose of converting it into a public highway and for sewerage purposes; but they made, it is claimed upon the part of the plaintiff, certain reservations, and that these reservations protected any water-power which he might own at lock No. 8.

Section 1st of that act, after granting the city the right to enter upon, improve and occupy for public highway and for sewerage purposes all or any part of that part of the Miami and Erie Canal which extends from Broadway to the Ohio River, including the width thereof, as owned or held by the State, made this reservation: "But the said grant shall be made subject to all outstanding rights and claims, if any, with which it may conflict."

That, we instruct you, means simply those rights and privileges and claims for which the State itself would be liable, and nothing more. That has been so decided by our supreme court; and, without saying why they have so decided, it is sufficient to say that it is so, and that it don't include any right of the plaintiff in this case.

SECTION 2.—Section 2 reads: "And the said grant shall be made upon the further condition that the city shall not obstruct the flow of water through the canal, nor destroy nor injure the present supply of water for milling purposes; and that the city shall be liable for all damages that may accrue from such obstruction or injury. But it is not intended hereby to relieve the lessees of the canal, or their assigns,

from any responsibility imposed upon them by an act to provide for leasing the public works, passed March 8th, 1861, or by the instrument of lease executed in pursuance of said act, except as to the extent that they may be interfered with as said city may from time to time enter upon and occupy any part of said grant."

Now, the effect of the second section is to make a reservation of whatever revenues the State of Ohio derived from the canal, either from the board, the lessees of the public works, or from private parties; that is, other parties than its lessees of the public works, to whom the State had let its water-power from time to time, and would include anybody having the right to use the surplus water at lock No. 8, sufficient to run six run of stone.

And furthermore, the act makes it the duty of the city not to obstruct the flow of water in the canal. In other words, that was the agreement between the State and the city. The State granted to the city the right to enter upon and use the canal, but reserved this right to have a full flow of water from the upper level of the canal into the Ohio River; and the city, by entering upon this part of the canal, should not obstruct the flow of water.

In addition to that, they could not destroy or injure the present supply of water for milling purposes. Not only must they not obstruct the flow of water in the canal, but they must not destroy the supply for milling purposes as it was then. All this must be construed with reference to the time of the passage of the act, and the existence of things at that time, and the rights of the parties as they existed at that time, and no other time. So that I instruct you that the State reserved the water privileges of the canal. They did not transfer to the city the revenues which the State derived from the canal, and they expressly prevented and required the city not to obstruct the flow of water in the canal; and, in addition to that, they expressly require that the city should not destroy or injure the present supply of water for milling purposes, as it then existed.

The statute goes on to say, that the city shall be liable for all damages that may accrue from such obstruction or injury. This is the part of the statute you have heard the court say neither added to or took from the rights of the parties. It was put in to save the rights of the State as against the city, and had no reference to the rights of third parties, but left them as they were at the time.

As I said before, the State had leased to Clark Williams all this power, and it leased to him under certain terms. I don't know, at this place, that it is necessary for me to call attention to the terms or stipulations of this lease; but, before I conclude my instructions to you, I shall call attention to those portions material in ascertaining what are the rights of the parties in this case.

Under this construction of the law—not only the law in regard to the power to lease and let out the water-power of the canal, but also the law ceding a portion of the canal to the city—it is sufficient if the plaintiff in this case at lock No. 8 owned the water-power from the State (it was his), and the city of Cincinnati interfered with it. With the
63 flow of water, as he had, under the terms of the assignment of the lease to him, a right to have it, he has aright to recover from the city such damages as he may prove to you were occasioned by such interference on the part of the city. If, as I say, he was the owner of the power at that time, and it was his, and the city interfered with it, preventing the flow of water there, then he is entitled to recover such

damages as he may show you he has sustained from the city, from the time that they caused such interruption until it ceased.

That gentlemen, in general terms, is his case; and I cannot better put before you the questions for your determination than by calling your attention to what the city claims as defenses to this claim of his.

The city claims that he had abandoned his power; that, at the time the canal was ceded to the city, he had no claims; in other words, he owned no power there.

Well, gentlemen, if he had abandoned his claim, and it was accepted by the State, then he had no power, and he can sustain no action.

Now, what causes an abandonment other than an express one—other than one that is made known in such terms that no one can mistake the meaning of it—is for you to determine from the facts of the case. It is not necessary for the party to enter into any formal agreements, either orally or in writing. It is not necessary to make use of any set phrases or forms of words. It is sufficient if the minds of the parties meet. A contract may be made out, when perhaps no one is able to point out any particular word said, sufficient for the jury required to pass upon it, to be satisfied that each one of the parties to it understood what the other meant, and that their minds met and agreed upon it. That would be a perfect contract, although no one were able to show any particular word or act. It is enough if the alleged acts are sufficient to satisfy the jury that the minds of the parties did meet upon all the terms of the contract.

Now, an abandonment might take place in this way: that the lessee, the person to whom the power to use the water is granted, neglects to comply with the terms of the contract.

He don't pay rent. He don't keep the waste-weir up. He don't keep the flume in repair. He don't keep in repair the building in which the power is used. He does nothing about it. The State don't collect any rent from him; don't call upon him for any; don't treat him as if he owned a power there. We cannot instruct you that these acts would be an absolute abandonment, but they are facts going to prove abandonment, and of more or less weight, as the circumstances indicate. It is for the jury to take all these circumstances and weigh them in their minds, and to say whether that is an abandonment on the one part and acceptance on the other, although no particular words or agreement is proved about it. Mere non-payment of rent would not conclusively prove that it was abandoned, and mere neglect to perform any or perhaps all the stipulations contained in the lease would not prove conclusively that it was abandoned. Nor would it, on the other side, provided that that was shown to exist a mere charging up of the rent on the books of the State, by the proper State authorities, that the State had not accepted the abandonment.

It would be evidence tending to prove it, perhaps, and evidence which the jury are to weigh in ascertaining whether they accepted it or not; but these are circumstances bearing on this question of abandonment, and are circumstances to be considered by the jury, to have such weight as they may be entitled to under all the circumstances of the case, in determining whether there was an abandonment.

It is claimed in addition to that, gentlemen, that it would become forfeited under these circumstances. There is a clause in this lease, or agreement, or instrument of writing, as follows: "And, if at any time any installment which shall become due for rent shall remain unpaid for one month from the time the same shall fall due, or, if the party of he second part shall fail to perform all the engagements as hereinbe

fore expressed, or permit to be done any act prohibited, or shall in any respect violate the agreement, then, in either case, the rights shall cease and determine, and any authorized agent of the State shall have full power and right to resume all the rights and privileges contained herein."

Now, by the terms of this lease, any one having a water-power, permitting the rent to remain unpaid for one month after the same shall fall due, or fail to perform all the engagements of the lease (and I will call attention to the engagements hereafter), then this lease becomes void and forfeited, and the State may re-enter and resume the privileges granted under it. If you find that the plaintiff had nothing in or upon which to use this water, that he did not pay his rent for one month after it fell due, or neglected the stipulations contained in the lease, that does not absolutely cut him out from any benefit under this lease. In order to work a forfeiture of all his rights, it must be accepted on the part of the State. It must resume all the privileges granted by this lease. It has the right to do it after one month's delinquency, as set forth; and, if it does do it, then the forfeiture becomes effectual, and the lessee has no rights that can be enforced. But until the State or its authorized agent (we mean anybody acting for the State) accepts that forfeiture, or does what is necessary to effect a forfeiture, it does not become a forfeiture. It does not become so absolutely. Both parties must act under the terms to make such a claim as that; so that he might have remained there one or half a dozen years; and, unless the State had resumed the rights and privileges contained in this lease, it would not have been a forfeiture. But all that the State had to do to show that it had accepted the privileges was simply to resume it; and that is almost as definite as the saying of a celebrated politician with reference to the resumption of specie payments, that the way to resume was to resume.

64 You may determine by the acts of the State whether they resumed the privileges contained in the lease. There are many things which the State might do, which would clearly indicate that it did resume them. And here I may say, that it is not necessary that the State should make use of technical language expressed orally or in writing.

It is sufficient if they do any act which clearly indicates that they have treated it as a forfeiture, and that they have taken back the privilege which they granted; and that you must determine from the facts in the case. If they have done it, then all the rights the party had under the lease are gone, and he is not entitled to maintain this action. That is, if the act of forfeiture was previous to any injury committed by the city then the plaintiff would have no cause of action against the city.

It is not necessary to re-enter or go upon the premises and demand the rents.

Here is an agreement that the lease shall become forfeited upon the party of the second part, that is, the person entitled to the use of the water, failing to perform certain things. If the other person chooses to put in force that forfeiture, and the other person being the State, by its authorized agent, should accept it, then the right of the plaintiff is entirely gone. The acceptance of the State might be indicated by the State not letting the water run there, not keeping up the head of water, or an amount of surplus water that would run six run of stone, or by doing any act that would turn that water away; whether they did it actively by turning away the water or by doing anything that would prevent it from running there.

If the State by neglect permits the gates of the locks to fall into dis-

use or decay, so that the water runs in another direction and entirely destroys the power, this lessee could maintain no action against the State; and, if the city did nothing more than that after the grant, no action can be maintained against her. Whether the State goes there and expressly turns it off, or by neglect or non-attention the State permits the water to go through the locks and not make or form any surplus water, and the city took it just as it was, then there is no cause of action against the city. There could be none against the State, and none against the city, if they only did what the State did.

All these acts are tending to prove an acceptance upon the part of the State of an alleged forfeiture under this instrument of writing; that is, if it appears that the plaintiff had neglected to pay rent for one month after it was due, or to do or perform any of the stipulations required of him in the agreement, although the State had determined to and did turn off the water from where it ran to supply his mill, or neglected to keep supply of water up, or turned the water in another direction—it may be taken as evidence to prove that the State had accepted the forfeiture. Whether it does satisfy you, is for you to determine under all the circumstances of the case. The city is not bound to do more than the State did.

If the State had suffered the power to fall into disuse—that is, the supply of water to fail—and the city continued the same, the city is not liable, if that was the condition of the supply at the time of the grant to the city.

It is not necessary to enter upon the premises and demand the rent. You will observe, and I so instruct you, that it is simply a water-power. There is no right to the land connected with it. I believe there is none claimed. At all events there is none; it is simply a grant of the use of the surplus water sufficient to run six run of stone at that place, and all this law in regard to re-entry, or going upon the premises at sundown and demanding rent, or at the last hour of daylight of the last day, don't apply. The State may do anything which would clearly indicate that they had resumed the rights mentioned in this lease, to put an end to it, or consummated the forfeiture—the other party having done what it is stipulated in this lease shall constitute a forfeiture.

As I have already incidentally said, the State is not liable for any diminution of water. The party entitled to the use of this power at lock No. 8 could bring no action, if the State should, actively or passively, permit the water to be diminished so as not to form a lead; if the State should entirely destroy it so that there should be a total loss, still there could be no right of action to the person entitled to the water, under the lease or the assignment of it. Nor is the city liable, if the rights, which were granted in this lease to the lessees, are resumed by the State, and by her transferred to the city; then the city would not be liable, because the State is not liable, and the city cannot be liable if she simply used what the State transferred to her.

It seems that there were proceedings commenced in the probate court to condemn the real estate, for the purpose of making Eggleston avenue ninety feet wide. This power, it is claimed, was used for propelling machinery at that lock. The city claims that by that condemnation this water-power was destroyed, and it is my duty to construe the effect of the decree in that case. It seems that after that case had progressed to a certain point, the parties, without pursuing the mode pointed out by the statute, settled their rights, agreeing among themselves, and permitting an entry to be made. Having done so, that controls their rights in the premises. We cannot tell what the parties ha

in their minds at the time the decree was entered. All we can speak of is the decree, which is on record, and the effect of it. It is as follows: "And has also agreed with said Fox to pay him the sum of $3,000, instead of the sum found for him in said verdict, said Fox to have the privilege of removing and using the stone and materials on his lot, and not prejudicing his use of the water on said premises."

65 Now, this don't destroy his water-power, if he had any there. The effect of the condemnation was not to destroy the water-power, but it had this effect; that he can get no damages for any act of the city in condemning the property. That verdict of $3,000 is good in law, including everything, not only the value of the real estate, but all damages which might be occasioned to the water-power by condemning that property and taking it to the city.

But it don't destroy the water-power, if there was any there, for anything that may be contained in this decree. But the city would not be liable for any damages that might result in taking the water-power or the damage occasioned by taking the water-power during the progress of this case to condemn.

I have examined this decree. It is not to prejudice his use of the water-power on said premises, and the premises are the premises condemned. I don't know that it makes very much difference.

Mr. JORDAN. That deed may help to explain it.

The COURT. We cannot take the deed. This decree governs the city. The city has a perfect right to take premises and use them.

But the effect of this decree is not to destroy the water-power at that place, but to prevent the party from getting damages which might be occasioned to him by condemning the property, where the property was used, or for the interruption of the use of the water-power in the litigation of this case, which went on for some time whilst it was in litigation; and the entry of this decree, finding this amount due to Fox, cut him off from any damages which might have been claimed by reason of the interruption during the progress of the case.

There was something said during the progress of the case as to the effect of transferring all this power to one person. If any of these were forfeited or abandoned, and the city had accepted them, either under the forfeiture or abandonment, although the water-powers were let out to a dozen different persons, or eleven out of the dozen had abandoned their powers and allowed their premises to be forfeited, then the State might take all the water-power of the eleven persons, or the State might take all the powers of the twelve persons by way of forfeiture or abandonment, and give them out to persons not among the twelve, and it would not give those twelve persons any greater rights for maintaining any suits against the city for damages.

I have gone over, I believe, all the elements, so far as the rights of the plaintiff to recover are concerned.

CHARGE 11.—11. If the plaintiff owned a power at this place, and it had never been abandoned or forfeited or resumed by the State, and it was in force at the time he alleges that the city commenced interrupting him, then he is entitled to recover any loss that he may have sustained and proved to you by reason of this interruption on the part of the city. But he will be only entitled to recover from the time the city actually interrupted him, not from the time of the transfer by the State to the city, unless the city immediately commenced operations which did interrupt the flow of water to his premises, or did interrupt him in the use of this power. For instance—we don't say that it is—if the State transferred this canal to the city in 1863. And although the city

worked in and about the part transferred to it, yet if they did not actually interrupt the plaintiff in the use of the power until 1867 or 1868, or whenever it might have been, then, of course, his right to recover commences only from that time, and not the time the city took possession under the grant from the State.

If you should find that he had this power at this time, and it had never been abandoned or forfeited; or, in other words, although he might have owed a great deal of rent for it, and although he might have neglected to perform the conditions set out in the lease, if he still did own it at that time, then he would be entitled to recover such damages as he has shown he has sustained by the city interrupting him in the use of that water.

But he can only recover such damages as he has actually sustained. You have no right to give damages for which he has sustained no loss. You are to give only such damages as he has shown to you he has sustained.

CHARGE 12.—12. There may be cases where the party is technically injured, and yet has sustained no loss, as where a right is technically injured. It may be so in this case. It is for you, gentlemen of the jury, to determine—if it should get that far, that he has been interrupted, and his right to the use of the water has been infringed by the city—it is for you to determine what damages he has sustained.

He is entitled to recover the value of the use to him. It is not claimed now that it is a permanent destruction of the water-power, if any existed at the time. It is only claimed that it is an interruption for a certain period, and he claims that he is entitled to damages for whatever would be the value of the use of the water to him for the time that it was of no use or value to him. You must govern yourselves accordingly. If it was of value and use to him, then he is entitled to recover.

CHARGE 13.—13. But, as I have said before, you cannot give any fanciful or imaginative damages. It is not for you to guess at it. You must come at your own verdict by having some sure data to
66 guide you. You must ascertain what the actual damage was, and that is all you can give. The amount you must ascertain, of course, by yourselves from the testimony.

If you find that the plaintiff had abandoned the power, and the abandonment was accepted by the State, or forfeited, and the forfeiture accepted by the State, then he cannot recover, because there was no water-power there for the city to interrupt; or, if the city did nothing more than the State had done before, then the city is not liable; or, if there was a power there at that time, then the city would be liable only from the time she interrupted the plaintiff in the use of the water and the amount of the interruption occasioned him in the use of it.

The court then gave the following special charges, asked by the plaintiff: first and sixth; and refused the following: second, third, fourth, and fifth, and the other charges asked. Mr. Warrington desired the court to charge as to the liability on the part of the State upon an abandonment of the water-power.

CHARGE 14.—14. The COURT. The State can abandon any part of the canal or the whole of it, and is liable to nobody, excepting the board of lessees of the public works.

CHARGE 15.—15. In reply to a question put by a juror the court said: The plaintiff would not be personally liable for the back rents of Geisendorff or Williams before him; but the State could cut off the water, although Fox had paid his rents, because the back rents were not paid, and still could resume all the privileges under the lease until

the back rents were paid. Fox would be liable in this way to pay the back rents. The water-power would be liable for it. Fox would not be personally liable for it, but the privileges of the lease might be resumed just the same.

Exceptions by the plaintiff.

The plaintiff excepts to such portions of said charge as relates—

EXCEPTION 1.—1. To the construction of the lease of the surplus water of the Miami Canal, in Cincinnati, to Clark Williams, dated 26th March, 1836, and to so much of said charge as declares the State of Ohio had power, under said lease, to resume the use of said surplus water for other purposes than the navigation of the canal, and to destroy the same, either directly, by the act of the legislature, or indirectly, by the negligence of the officers of the State in suffering the lock-gates to go out of repair.

EXCEPTION 2.—2. To so much of said charge as relates to the construction of the act, entitled "An act to authorize the city of Cincinnati to enter upon and occupy a part of the Miami and Erie Canal as a public highway and for sewerage purposes," and in charging that the city was not liable for losses sustained by or injuries done to individuals, unless the State would be liable for such acts.

EXCEPTION 3.—3. The plaintiff also excepts to so much of said charge as relates to the doctrine of abandonment by the lessee and his assignees in relation to what amounts to an abandonment; in deciding that it was not necessary for the parties to enter into a formal agreement, either orally or in writing, or to make use of set phrases or form of words.

To the part which charges that an abandonment may take place where the lessee neglects to comply with the terms of the contract; when he does not pay his rent; when he does not keep the waste-weir up; when he does not keep the buildings in repair.

EXCEPTION 4.—4. The plaintiff also excepts to such portions of said charge as relates to what facts constitute a forfeiture of the rights of the lessee under the lease to Clark Williams.

In deciding, if Fox had nothing to use the water upon, he could not recover. If he neglected the stipulations of the lease, and the State has the right after one month of rent is due, and if it exercises the right, the lessee has no right.

That the State was not bound to make any technical demand of the rent due, as no land was leased, but merely a water-power; that the language of the lease forfeits without demand of rent or re-entry.

That the assent to the State of the forfeiture may be shown by not letting the water run; by not keeping up the head of water sufficient to run six run of stone; by doing any act that would prevent it running there; by permitting the gates of the lock to fall into disuse or decay, so that the water runs in another direction, and that, because the State would not be liable for damage caused as above, therefore the city is not liable.

In deciding that the forfeiture of a lease of water-power may be perfected without the demand for rent, at the time and place, and for the precise amount due, as in other leases.

Also, to so much of the charge as relates to the non-liability of the State for a diminution of the water at lock No. 8, by active or passive permission of the State; and that, if the State would not have been liable, the city, claiming under the State, is not liable.

Also, to so much of the charge as declares Fox is prevented from claiming damages he might have sustained by reason of the interruption of his water-power during the progress of the condemnation suit.

67 Also, to so much as charges that if the plaintiff had abandoned or forfeited the power, and this was accepted by the State; or if the city had done nothing more than the State had done before, then the city is not liable, because there is no evidence to warrant such charge.

Also, to so much of the charge as declares the State could abandon any part of the canal or the whole of it, and are liable to nobody except the lessees of the public works; and although Fox had paid his rents, because the back rents were not paid, and could resume all the privileges under the lease until the back rents were paid. Fox would not be personally liable for back rents, but the privileges might be resumed just the same.

EXCEPTIONS.—To all which portions of the charge of the court, and to the whole charge and every part thereof, the plaintiff, by his counsel, excepts, and prays this his bill of exceptions may be signed, sealed and allowed, and be made part of the record, which is allowed and ordered.

[SEAL.]

And the jury, after retiring and before rendering a verdict, asked the court for further instructions as to the effect produced by the defect in the lock gates, which the court gave as follows:

I charge you that unless water was in fact passing over the tumble at lock No. 8, so that it might have been used if a wheel had been there at the time of passing the act of March 24, 1863—at the time of the transfer of title from the State to the city—authorizing the city of Cincinnati to enter upon and occupy a part of the Miami Canal as a public highway for sewerage purposes, then your verdict must be for the defendant; and it makes no difference whether there was water in the lock or not the law is the same. If there was water enough at that time running over the tumble to run one or more run of stones, and the city interrupts the flow, plaintiff would be entitled to recover his actual damage.

EXCEPTIONS.—To which last instructions so given to the jury, the counsel for the plaintiff excepts, and prays this his bill of exceptions may be signed and allowed, and made part of the record, which is ordered and allowed.

[SEAL.] CHARLES C. MURDOCK.

And the motion for a new trial, for reasons filed, being submitted to the court, it was admitted the foregoing testimony and exhibits was all the testimony used before the jury on the trial of the cause; and, upon the motion for a new trial, the court overruled the motion for a new trial, and ordered judgment on the verdict; to which overruling of said motion for a new trial the plaintiff, by his counsel, excepts, and prays this his exception be signed and allowed, and made part of the record, which is accordingly ordered.

[SEAL.] CHARLES C. MURDOCK.

Lease: State of Ohio to Clark Williams.—Paper B, made part of bill of exceptions. (*Paper B, page* 48.)

This agreement, made this 26th day of March, 1836, between the State of Ohio, party of the first part, by Samuel Forrer, acting canal commissioner, thereto duly authorized by law and by order of the board of canal commissioners, made in pursuance thereof, and Clark Williams, of the city of Cincinnati, party of the second part, witnesseth: That the said party of the first part, in consideration of the rents reserved, and the covenants of the party of the second part hereinafter contained, and upon the express condition that the party of the second part shall continue during the whole of the term to comply with all and singular the limitations and conditions hereinafter contained; and shall, in every respect, perform all the stipulations of this agreement, by the said party to be performed, agrees to sell and lease to the said party of the second part, for the term of ninety-nine years, from and after the first day of April, 1836, and renewable forever, subject to the restrictions, limitations, and conditions herein contained, the use and occupation of all the water-power owned by the State of Ohio at the locks on the Miami and Erie Canal within the corporated limits of the city of Cincinnati, it being all the surplus water which may at any time pass the said locks, and which will not be requisite to pass boats and other floats through the locks, excepting all water heretofore leased to William Richmond and Death, and to Clark Williams, together with an additional quantity hereby reserved, to be added, if desired by the first party, to the power at present occupied by C. L. Bradley, under the lease of William Richmond and Death, sufficient to increase the power under said lease to one for nine pair of stone. Also, excepting a quantity of water not exceeding fifty cubic feet per minute, for the purpose of supplying tanneries and other establishments requiring small portions to be taken through the canal banks in small tubes, the right to which is
68 hereby expressly reserved; excepting in such cases when the second party can furnish the water from the channel or forebays constructed for the conducting of water between the canal and his hydraulic machinery. The whole quantity specifically leased to be equal to a power to drive one pair of four and a half feet diameter millstone, which, together with the necessary machinery, will be capable of manufacturing one hundred bushels of wheat into superfine flour in twenty-four hours at the upper lock; three such powers at each of the second and third locks, and six such powers at each of the remaining seven locks. The water hereby leased to be conveyed to the mills or other hydraulic works from between two regulating weirs to be constructed by and at the expense of the party of the second part, as hereinafter specified. And the said party of the second part, for and in consideration of the right to the use and occupation of said water, agrees to pay to the said State the yearly rent, or sum of two hundred and fifty dollars for each power for one pair of stones, as above at the four and a half upper locks; one hundred and fifty dollars at the next lock and a half; one hundred dollars at the seventh; seventy-five dollars at the eighth, and fifty dollars at the ninth lock. Provided, the party of the second part shall not be deprived of the use thereof for more than one month, in the aggregate, in any one year. And if for the purpose of repairing the canal, preventing breaches, removing bars or other obstructions, or making any improvements to the canal or the work connected therewith, in consequence of breaches or the inadequacy of the supply of water, the party of the second part shall be either partially or wholly

deprived of the use of any portion of the water-power hereby leased, so as to prevent the operation of any of the hydraulic works usually propelled by the water-power hereby leased, such deduction shall be made from the rent accruing on such portion of the water-power as the said party is so prevented from using as will bear the same proportion to the yearly rent thereof as the time during which the party has been deprived of its use bear to eleven months. The rent to be paid semi-annually, on the 1st day of May and November in each and every year during the continuance of this lease, to the collector of tolls at the city of Cincinnati, or other agent of the State duly authorized to receive the same. And the said party of the second part further agrees to erect at his own expense, in a good, secure, substantial and workmanlike manner, the regulating weir above mentioned; to be constructed of stone walls and plates of wood, with a substantial iron bar securely bolted to the top thereof, agreeably to a plan to be furnished by the acting commissioner or engineer employed on any adjoining part of the canal, under the direction and subject to the inspection of such acting commissioner or engineer.

AGREEMENT.—And the said party of the second part further agrees during the continuance of this lease to keep constantly in good order and repair the weir-head and tail-race, and other works and devices connected with the use of the water hereby leased, so far as the same shall be necessary to secure the regular and uniform flow of the water from the upper to the lower levels, and also to prevent any breach in the bank, the formation of a bar or other impediment to the canal or the navigation thereof; and if, nevertheless, any breach, bar, or other injury or impediment should occur in consequence of any of said works not being faithfully and substantially constructed, or being suffered to be out of repair, then the said party of the second part shall, on being notified thereof by said acting commissioner or engineer, or other proper agent of the State, immediately repair such breach or other injury, or if such agent of the State shall cause the same to be done (which he is hereby authorized at his own option to do) then said party of the second part shall pay to said agent all necessary expenses incurred in repairing such breach or other injury on demand.

It is expressly understood and agreed by and between the parties that for the purpose of preventing or repairing breaches, removing bars or other obstructions to the navigation of the canal, or for the purpose of making any improvements in the canal, or the works or devices connected therewith, any authorized agent of the party of the first part may cause the water to be drawn either partially or wholly out of the canal, and to remain so drawn out so long as may be necessary for any of the aforesaid purposes. And the said party of the second part shall not be entitled to any deduction of the rent hereby made payable, unless said party shall thereby be deprived of the use of the water for more than one month in any one year. And the said party of the first part reserves the right to resume at any time the use of the water hereby leased whenever the same shall become necessary for the purpose of navigation, and to continue the use thereof so long as the same shall be necessary for the purpose aforesaid; and if it shall become necessary for the party of the first part to resume the use of so great a portion of the water hereby leased, or the whole thereof, for so great a portion of the time as to defeat the object of this lease by destroying the value of the privilege (which fact shall be determined by three judicious, disinterested freeholders; one to be chosen by the acting commissioner or other authorized agent of the State, one by the party of

the second part, and the third by the two thus chosen), then the party of the second part shall be from such time absolved from all further liabilities growing out of this agreement.

And it is further understood and agreed that the water-power hereby leased shall not be used to drive or propel any saw-mill or other machinery or work from which sawdust, chips or other rubbish will be likely to be carried through or floated into the canal so as to form bars or other obstructions to the navigation in the canal, or to clog the gates, waste-weir, or regulating weir, or otherwise injure or obstruct the same.

And the party of the second part shall at all times be bound to keep the canal clear of all rubbish or other obstructions consequent, in any manner, on the use of the water hereby leased, or the works or machinery erected therefor. Provided, that the above restrictions with regard to saw-mills and machinery shall only apply to such cases as where the water used to propel saw-mills and such other machinery will again flow into the canal.

69 And it is further agreed, that the aforesaid rents shall become changeable within ten years from the date of this agreement on all the water-power herein specifically leased. Provided, that if any, or a portion of the whole of it, should be brought into use before the expiration of the term of ten years, then such portion of the whole shall be paid for (at the rates above named) and become chargeable with rent from and after the expiration of one year from the time of the commencement of its use; and provided further, that the party of the first part have the right to present applicants for water-power at any time to the second party, and may require any water-power to be leased to such applicant upon the same terms at which the same water-power is hereby rented to the second party; and the second party may release himself from this condition by then agreeing to commence paying rent for the powers so applied for in two years from the date of application. And if at any time any installment which shall become due for rent, as hereinbefore expressed, shall remain unpaid for one month from the time the same shall fall due, or if the party of the second part shall in any respect fail to fulfil and perform all the engagements of said party, as hereinbefore expressed, or shall do or permit to be done any act or thing hereby prohibited, or shall in any respect violate this agreement, then, and in either case, the rights and privileges derivable from this agreement shall, from the time of such failure or violation, cease and determine; and any authorized agent of the State or lessee under said State shall have the full right and power to enter upon and resume all the rights and privileges hereby granted to the party of the second part. And the party of the second part shall, moreover, be liable for all damages consequent upon such violation of this agreement.

And it is further understood and agreed that the party of the second part shall be entitled to a lease for any and all ground which may be necessary for the use and occupancy of the aforesaid water-power so soon as the right to such ground shall be vested in the State. And that the second party shall pay to the party of the first part a yearly rent therefor, in addition to the rent of the water-power semi-annually, on the first day of November and May, at the rate of six per cent. per annum on the actual cost to the State of any such ground so leased; and that the ground shall, in all cases, become chargeable from and after the date of the lease therefor.

And it is further understood and agreed that the water-power herein leased shall in no case be used on any ground which shall not have

been previously conveyed or secured to be conveyed to the State when such conveyance shall be demanded by the party of the first part; nor shall any water-power, once located on ground once conveyed to the State be changed to any new location until the right of way for the water to and from such new location shall also be secured, nor until the head and tail races and all other appendages necessary to the secure and permanent conducting of the water between the canal and said new location shall be constructed and placed in a condition to secure the State against any expense not incident to the former location. And provided that there shall not be less than three mill-stone powers used at each of the locks numbers four, five, and six, which shall not be diverted therefrom without first obtaining the assent of the legal representatives of the heirs of Martin Baum, deceased.

And it is further understood and agreed, that the party of the first part shall, in all cases of purchasing ground from the party of the second part, pay the amount which may be assigned on any new locations as above by three disinterested persons, one of which to be appointed by each party and the third by the two they appointed. And that it shall be optional with the first party either to continue to the second party the lease before granted on such lot or lots as may be vacated when said lots had been previously purchased by the State from persons other than the second party, or to require the said second party to convey or release to the State his claims on such vacated lots so previously purchased and owned by the State.

And it is further understood and agreed that any water-power which may be added to that which has been already specified and granted in this lease shall be and is hereby leased on the same terms and conditions as the foregoing, with the exception that the term named (ten years) as the longest in which the payment of the rent may commence, and shall begin when the first shall give written notice to the second party that the State is ready to furnish an additional supply of water.

It is further agreed that whenever the party of the second part shall pay to the State the sum of which the rents herein stipulated is the legal interest, the party of the second part shall be entitled to receive a deed of conveyance absolute to said party of the premises and privileges hereby leased, reserving, however, the right of resuming the water as hereinbefore specified. And the State shall, moreover, be exempt from any claim of drawback or deduction on account of any partial deficiency in the stipulated supply of water.

And it is further agreed, that, in the event of a forfeiture of this lease, that privileges and sub-tenants shall be so far protected by the party of the first part as to give them the privilege of claiming a lease from the State for any water-power previously occupied under a grant from the party of the second part, by stipulating to pay to the State an advance of ten per cent. on the rate of rent fixed and agreed upon in this agreement for the same privileges. Provided that said sub-tenant holds a lease for not less than two mill-stone powers, and that he produce satisfactory evidence that he has been faithful and punctual in all his engagements with the present lessee.

It is further understood and agreed, that nothing herein contained shall be so construed as to prohibit the party of the second part from changing the location of one-half of the water-power herein leased, to any other suitable ground in the city of Cincinnati or its immediate neighborhood, subject to the provisions hereinbefore contained.

70 And it is further agreed that no applicant for water-power shall be presented by the party of the first part, as hereinbefore stip-

ulated, unless the party of the second part should unreasonably delay the bringing of said power into use.

In testimony whereof the parties executed this agreement the day and year first above written.

SAM'L FORROR, [SEAL.]
Acting Canal Commissioner.
CLARK WILLIAMS. [SEAL.]

Signed, sealed, and delivered in presence of—
R. A. MADISON,
JAS. H. MITCHELL,
ANDREW YOUNG,
For signature of Sam'l Forror.
G. W. RICE, to Clark Williams.

PAPER D.—*Verdict.*

CITY OF CINCINNATI
vs.
C. W. WOOLLEY, CHARLES FOX, AND OTHERS. } No. 25934. January term, 1865.

Now comes said jury in open court, with their verdict in writing and signed by their foreman, and say:

"We, the jury in the issues joined, find for the defendants, and assess as their full compensation, to be paid to them, the sum of money annexed to their names respectively, for their ground described in the petition, and to be taken by the plaintiff for Eggleston avenue. Anthony Fay, lot No. 12, $4,000; Charles E. and I. Elstner, lot No. 11, $500; E. Morgan, lot No. 10, $4,500; R. E. Whetstone, lot No. 9, $450; C. Fortman, lot No. 8, $1,500; G. H. & A. H. Davis, lot No. 13, $4,500; Gregory Dagneau, lot No. 14, $1,500; F. Hamlin, lot No. 15, $900; P. Creighton, lot No. 16, $600. We also find that Charles Fox's lots No. 18 and 19 should be paid as his full compensation $4,000, if he owns the nineteen feet of ground between the centre of the avenue and his ground described in the petition, but if he is not the owner of said nineteen feet, then his full compensation should be only $2,875. We also find that A. Taft, lot No. 5, be paid as his full compensation $4,650, if he owns the nineteen feet of ground between the centre of the avenue and his ground described in the petition; but in case he is not the owner of said nineteen feet, then his full compensation should be only $1,846.50.

"O. D. WHITE, *Foreman.*"

Verdict for defendants.

CITY OF CINCINNATI
vs.
C. W. WOOLLEY, CHARLES FOX, AND OTHERS. } No. 25934. January term, 1866.

Whereas a final order was made in said case April 12th, 1865, in accordance with a verdict rendered therein, and whereas said plaintiff has agreed with Peter Creighton, one of the defendants, to pay him one thousand dollars for his interest in property condemned for public use in said case instead of the sum found for him in said verdict, said Creighton to have all the building materials on the lot taken out by plaintiff, the same to be removed by him;

And has further agreed with Joseph, Charles E., and Sarah I. Elstner, defendants in said case, to pay them seven hundred and fifty dol-

lars ($750) for their joint interest in said property, subject to certain reservations contained in a deed from said Elstner to said plaintiff, dated December 21st, 1865, instead of the sum found for them in said verdict;

And has also agreed with Charles Fox and Alphonso Taft, other defendants in said case, to pay them the sum of three thousand dollars ($3,000) to said Fox and four thousand dollars ($4,000) to said Taft, respectively, instead of the sums found for them in said verdict; said Fox to have the privilege of removing and using the stone and materials on his lot, and not prejudicing his use of the water-power on said premises:

And now, therefore, it is ordered by said court, that upon the payment by said plaintiff to the defendants herein named the sum so agreed upon, or upon depositing the same as required in said final order, said plaintiff shall have possession of said property subject to the conditions herein set forth.

And it is further ordered that said final order be hereby confirmed and made final except as herein modified, and that this order be final as to the defendants herein named.

PAPER E.

Know all men by these presents, that we, Joseph Longworth and Larz Anderson, executors of Nicholas Longworth, deceased, hold the legal title, and Charles Fox holds the equitable title to the following described real estate, situated in the city of Cincinnati, bounded west by a line drawn through the center of the Miami Canal between the lock walls, and on the east by a line drawn parallel with the same line and at a distance of thirty-nine feet east of line, and which is the east line of Eggleston avenue, fronting on the south side of Pearl street, and running back the same width, about one hundred and fifty feet to
71 the south line of the old cotton factory building; and whereas the City of Cincinnati is desirous of receiving a conveyance of said lot to be used and appropriated as part of a public highway named Eggleston avenue: Now, therefore, in consideration of three thousand dollars to us paid by the City of Cincinnati, the receipt whereof is hereby acknowledged, we, the said Joseph Longworth and Larz Anderson, executors of Nicholas Longworth, and Charles Fox, have granted and sold, and do hereby grant, bargain, sell, and convey to the said City of Cincinnati, the said premises so described as aforesaid, subject, however to the reservation of the right to take down the walls now standing on said premises, and using the stone thereof in rebuilding walls and foundations on the remaining part of the lot, on the east side of the lot hereby granted, and without prejudice to the right to the tenant and assigns of the water-power used in said lot of conducting to and using said water-power on said lot.

To have and hold said premises to the said City of Cincinnati, her successors and assigns forever.

And the said Joseph Longworth and Larz Anderson, executors of Nicholas Longworth, and Charles Fox, hereby covenant with the said City of Cincinnati, her successors and assigns, that they are the true owners of said lot as above set forth, and will warrant and forever defend the title and possession of said lot, subject to the reservations aforesaid, to the said City of Cincinnati, her successors and assigns.

In testimony whereof the grantors, Joseph Longworth and Larz An-

derson, executors, and Charles Fox, have hereunto set their hands and seals this twenty-first day of November, 1865.

JOS. LONGWORTH. [SEAL.]
Executor of N. Longworth.
LARZ ANDERSON. [SEAL.]
Executor of N. Longworth.
CHARLES FOX. [SEAL.]

Signed and sealed in presence of—
ALLEN BROOM, as to Charles Fox.
JAS. F. NOBLE, as to executors of N. Longworth.
CHARLES H. FOX, as to all.

Be it remembered that on the 21st day of November, in the year of our Lord one thousand eight hundred and sixty-five, before me the undersigned notary public in and for said county, personally came Joseph Longworth and Larz Anderson, executors of N. Longworth, deceased, and Charles Fox, the grantors in the foregoing deed, and acknowledged the signing and sealing thereof to be their voluntary act and deed for uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal on the day and year aforesaid.

CHARLES FOX. [N. P. SEAL.]
Notary Public.

PAPER R.

Whereas the State of Ohio, heretofore, by its proper officer, executed to Clark Williams two leases, dated respectively February 24th, 1834, and March 26th, 1836, of certain water power upon the Miami Canal at the city of Cincinnati, in said leases respectively specified;

And whereas the said State, by its proper officer, executed the said Williams a lease, dated January 1st, 1836, of certain land therein described, and situated in the said city of Cincinnati, reference being hereby made to said lease for the particulars thereof and for greater certainty;

And whereas said Clark Williams, by subleases and other contracts, has heretofore sold and transferred all his rights, titles, and interests under said leases to sundry individuals, who bound themselves to pay the rents reserved by said leases which said Williams was bound to pay;

And whereas large amounts of rents under said leases which became due after said sales and transfers by said Williams remain unpaid;

And whereas by a certain agreement between said Williams and the board of public works of the State of Ohio, bearing date March 3rd, 1860, all claims on the part of the State against Williams in respect of all such rents which accrued after the 31st day of October, A. D. 1853, and prior to the 3rd day of March, 1860, were adjusted and settled, and said Williams wholly discharged from the same:

Now this further agreement between said board of public works and said Williams witnesseth as follows:

"I. The said Williams hath paid to said board of public works the sum of $750, the receipt whereof is hereby acknowledged.

"II. The said Williams hereby assigns and transfers to the State all claims whatsoever in his favor which have heretofore accrued or may hereafter accrue against any and all persons whomsoever in anywise

touching the rents reserved by said leases or either thereof; but this assignment and transfer are made without any guarantee or liability whatsoever on the part of said Williams.

72 "III. The said Williams hereby agrees that the president of the board of public works for the time being may annul and cancel said leases, or either of them, whenever said board may deem it for the interest of the State so to do, and may direct the same to be done: Provided, that neither of said leases shall be annulled while said annulment or cancellation will involve said Williams in any liability to any person or persons whomsoever claiming rights or interests under said leases.

"IV. In consideration of the premises, said board of public works doth hereby wholly release and discharge said Williams from all liability, claims, and demands whatsoever, to and in favor of the State, past, present, and future, arising from said State leases to him, or either thereof, and so that from the date hereof he will be absolved from all such liability in all respects as if neither of said leases had been executed on his part. Nothing herein contained, however, shall in anywise affect the right of the State to enforce, for its benefit, the liabilities of other parties hereinbefore assigned and transferred by said Williams to the State.

"In witness whereof, the said Clark Williams hath hereunto set his hand and seal, and John L. Martin, president of said board of public works, hath hereunto set his official signature this the second day of April, A. D. 1861."

CLARK WILLIAMS. [SEAL.]
JOHN L. MARTIN,
Acting Comm. Dir. 3, P. W., and Pres. of the Board.

Attest:
ELIZA WILLIAMS.
CHAS. A. SAUNDERS, for Clark Williams.
HORATIO J. COX, as to J. L. Martin.

PAPER P.

Know all men by these presents that whereas, by an act of the general assembly of the State of Ohio, passed on the twenty-fourth day of March, in the year of our Lord 1863, authority and permission was granted to the city of Cincinnati to enter upon, improve, and occupy forever as a public highway and for sewerage purposes all or any of that part of the Miami and Erie Canal which extends from the east side of Broadway in said city to the Ohio River, including the width thereof as owned or held by the State, and the said grant made subject to all outstanding rights or claims, if any, with which it might conflict, and the revenues derived from the water privileges in said canal thereby expressly reserved, and that the said city, in the use of said canal, or any portion thereof, should not obstruct the flow of water through the same, nor destroy nor injure the present supply of said water for milling purposes, and that the said city should be liable for any damages that might occur from such obstruction or injury, and that whenever the council, by a vote of not less than two-thirds of the whole number of members thereof, should decide to use said canal as in said act authorized should make known its decision to the governor, and that thereupon the governor, in behalf of the State, should execute and deliver to the city of Cincinnati a grant of the part of said canal in

said act described for the uses and purposes before mentioned and upon the terms and conditions specified in said act; and whereas the said council of the city of Cincinnati, on the twenty-fourth day of March, in the year of our Lord 1863, decided to use said canal as in said act authorized according to the conditions thereof, and has made know' its decision to me as required in said act, I, David Tod, governor of the State of Ohio, in behalf of said State, by virtue of the authority conferred upon me in the premises, do hereby grant unto the said city of Cincinnati all or any of that part of the Miami and Erie Canal extending from the east side of Broadway in said city to the Ohio River, including the width thereof as mentioned or held by the State, to enter upon, improve, and occupy the same forever as a public highway and for sewerage purposes, upon the conditions and subject to all the rights, claims, reservations, and restrictions mentioned in said act.

In testimony whereof I have hereunto set my hand officially and affixed the great seal of said State of Ohio, at Columbus, this 28th day of April, A. D. 1863.

By the Governor:

[GREAT SEAL OF STATE.]

DAVID TOD.
W. W. ARMSTRONG,
Secretary of State.

PAPER S.

This article of agreement, made and concluded this seventh day of August, A. D. 1867, between John Boyle on the one part, and the City of Cincinnati (acting by H. H. Tatem, city auditor, thereunto duly authorized), of the other part, witnesseth: That the said John Boyle, for the consideration of the stipulations hereinafter set forth, does hereby covenant with the city aforesaid, for himself, his heirs, executors, and administrators, that the said John Boyle shall, within month from the date hereof, furnish all the materials for, and do all and singular the work in building a portion of the main sewer in Eggleston avenue from the north side of the waste-way at Third street bridge to the south end of the locks at the Ohio River, agreeable to the plans and specifications on file in the office of the city civil engineer, which are hereby referred to, and made a part and parcel of this agreement.

73 The work to be done and materials furnished, under the direction and to the satisfaction of the city civil engineer, city commissioner, or other authorized agent of the city superintending the same.

It is further agreed, that if the said John Boyle shall, in the opinion of the board of city improvements, fail to proceed with said work according to this contract, or shall not proceed with the same in the manner, or as the said board may deem advisable, and to the entire satisfaction of said board, it shall be lawful for said board to employ any other person, by contract or day's work, or otherwise, to proceed with said work and complete the same; and said board in such case may at their option declare this contract void as to the said John Boyle, but without prejudice to any right of action in the city which the said John Boyle may be subject unto.

In consideration of a prompt and faithful performance of this agreement on the part of said John Boyle, the said City of Cincinnati does hereby covenant with the said John Boyle, his executors or administrators, that she will allow unto the said John Boyle for the materials

furnished and labor performed under this contract, and in accordance therewith, to wit:

For freestone work, composed of the stone taken from the present lock walls on the line embraced in the specifications, per perch	$18 00
For freestone work of new material	24 90
For furnishing and laying stone forming the lower portion of the ring or arch of sewer, as per specifications, per perch	27 00
For laying Xenia stone on land in lower portion of the ring or arch of sewer, as per specifications, per perch	7 00
For laying freestone on land in upper portion of the ring or arch of sewer, as per specifications, per perch	6 00
For brick, per perch	15 00
For common rubble masonry in lock chambers, per perch	6 00
For first class rubble masonry in launch and backing walls, per perch	8 00
For concrete, per perch	8 00
For timber foundation, per thousand feet, board measure	45 00
For excavation of all kinds, including filling back over sewer, per cubic yard	75
For brick in branches, main hole, catch basins, etc., per thousand	30 00

I will also give two thousand dollars for the tools, or whatever two or three disinterested men may say they are worth, and will allow a reasonable price to be fixed by the city civil engineer for the old limestone.

Any work done under direction of the city civil engineer and not specified is to be paid for at a price to be fixed by the city civil engineer.

In case it is found necessary by the city civil engineer to change the size or shape of the sewer at any point, or otherwise alter the plan of the work so as to diminish or increase the relative cost of the work, an addition or deduction is to be made, at the contract price for same, as the case may be.

It is understood that the perch in all cases is 25 cubic feet.

In witness whereof, H. H. Tatem, for and on behalf of the said city, has hereunto set his hand and seal, as her act, by order of the city council, and the other party has hereunto set his hand and seal the seventh day of August, A. D. 1867.

(Signed) JOHN BOYLE.
(Signed) H. H. TATEM,
City Auditor.

[5 cent rev. stamp.]

The above is correctly copied from the books of the city.

In testimony whereof, I have hereunto set my name and affixed the seal of the city auditor's office, this 12th day of February, in the year eighteen hundred and seventy-two.

R. S. POMEROY,
Ass't City Auditor.

74 PAPER W.

Number of days that the water of the Ohio River was above the surface (1098.19) of water in the canal below the lock under Pearl street.

Years.	1858.	1859.	1860.	1861.	1862.	1863.	1864.	1865.	1866.	1867.
Months.	*Days.*	*Days.*	*Days.*	*Days.*	*Days.*	*Days.*	*Days.*	*Days.*	*Days.*	*Days.*
January	.....	9	10	15	17	15	2	13	14	.....
February	.....	13	3	19	23	21	2	9	13	26
March	.....	31	9	11	31	28	13	31	23	31
April	.....	22	14	18	24	11	22	23	13	18
May	.....	7	3	13	4	4	9	22	2	12
June	21	.....	.....	.....	4	.....	.....	.....	.....	3
July	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
August	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
September	.....	.....	.....	1	.....	.....	.....	.....	11	.....
October	.....	.....	.....	11	.....	.....	.....	.....	4	.....
November	.....	.....	12	9	.....	.....	12	.....	6	.....
December	23	10	11	7	.....	3	12	10	18	5
Total	44	92	62	104	103	82	72	108	104	95

Whole number of days in 9 years is 822; and $\frac{822}{9}$=91.333 days, the average per year=25 per cent. of the whole year that the water is above the surface of water in the canal at Fox's power, and $\frac{3}{4}$ of the year the power is entirely unobstructed by backwater.

CLEMENT DARE.

75 And thereafter, on the 18th day of December, A. D. 1878, the following journal entry was made in this cause, to wit:

CHARLES FOX *vs.* THE CITY OF CINCINNATI. } Error reserved in the district court of Hamilton County.

This cause came on to be heard upon the transcript of the record of the court of common pleas of Hamilton County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court that the judgment of the said court of common pleas be and the same is hereby affirmed.

It is further considered that the defendant in error recover of the plaintiff in error its costs herein expended to be taxed.

Ordered, That a special mandate be sent to the court of common pleas of Hamilton County to carry this judgment into execution.

Ordered, That a copy of this entry be certified to the clerk of the district court of Hamilton County "for entry."

And afterwards, on the 3rd day of January, A. D. 1879, the following journal entry was made in this cause, to wit:

CHARLES FOX *vs.* THE CITY OF CINCINNATI. } Error reserved in the district court of Hamilton County.

76 And the court, on motion of the plaintiff in error, order it to be certified and made part of the record in this case, and of the above judgment and entry of affirmance, that the plaintiff claimed to recover in this action damages of the defendant in error, for depriving him of the use of surplus water at lock No. 8, in the city of Cincinnati, which he claimed to own by virtue of the lease from the State of Ohio to Clark

Williams (and assignments thereof to him), dated the 26th day of March, 1836, being paper marked B in the record, and the agreement to reduce the rent dated 1 Nov., 1853, being paper marked A in the record.

And the defendant gave in evidence a law passed by the Ohio legislature entitled "An act authorizing the city of Cincinnati to enter upon and occupy a part of the Miami and Erie Canal as a public highway and for sewerage purposes," a copy of which is inserted in the record, and claimed that by virtue of said act the city of Cincinnati had power so to lay out what is called Eggleston avenue as to cut off the supply of water (after being used at lock No. 7) to lock No. 8, owned by plaintiff without liability to plaintiff for any damage occasioned to him by such act.

And this court further order it to be certified that said plaintiff in error claimed and asked the court to hold that said act of the
77 legislature, passed on the 24th March, 1863, is repugnant to articles 5th, 13th, 14th, and 15th of amendments to the Constitution of the United States, and are void so far as they authorized the city to injure, or destroy, or make less valuable the said water-power of the plaintiff without making compensation for such injury. But this court ordered and adjudged that the said act was not repugnant to articles 5th, 13th, 14th, or 15th of the amendments to the Constitution of the United States, and thereupon affirmed the judgment and ordered a special mandate to the court of common pleas of Hamilton County to carry said judgment into execution.

And it is further ordered by the court to be certified that the question of the validity of said act of the general assembly of the State of Ohio, passed 24th March, 1863, in the particulars mentioned was drawn in question on the hearing and decision of said case, as being repugnant to the above mentioned articles of amendments to the Constitution of the United States, and that the decision of this court was in favor of the validity of said act.

And it is hereby certified that this court is the highest court of law or equity in the State of Ohio in which a decision can be had.

I, Richard J. Fanning, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing is a true and correct copy of the record of the case of Charles Fox *vs.* The City of Cincinnati
78 in said supreme court.

In testimony whereof I have hereunto affixed the seal of said court and set my hand this 20th day of January, A. D. 1879.

[SEAL.] RICHARD J. FANNING,
Clerk Supreme Court Ohio.

Fees $7.00; paid C. Fox.

FRED. GREEN, *Dep. Clk.*

(Indorsement on cover:) No. 174. Charles Fox, plaintiff in Error, vs. The City of Cincinnati. Ohio sup. court. Filed 12th April, 1879.

SUPREME COURT

OF THE UNITED STATES.

CHARLES FOX,

VS.

CITY OF CINCINNATI.

BRIEF FOR PLAINTIFF.

F. E. STOZ, PRINTER, CINCINNATI.

CHARLES FOX
vs.
THE CITY OF CINCINNATI.

SUPREME COURT OF THE U. S.
ON ERROR TO THE
Supreme Court of the State of Ohio.

The plaintiff sued the City of Cincinnati for damages sustained by him by the City of Cincinnati, for the loss of plaintiff occasioned by the City of the use of surplus water power at Lock No. 8, in the City of Cincinnati.

The history of the case is as follows:

1st. The statute of the Legislature authorizing the leasing of the surplus water powers will be found in 3rd Chases Statute, p. 1659.

2nd. The lease made to Clark Williams by the State of Ohio, dated March 26th, 1836, by which the State leases to Williams for ninety-nine years, renewable forever, the use and occupation of all the water powers owned by the State of Ohio at the Locks on the Miami and Erie Canal, within the corporation limits of the City of Cincinnati, it being all the surplus water which may at any time pass the said Locks, and which will not be requisite to pass boats and other floats through the Locks, excepting water before leased to Richmond & Death, and other names not affecting Lock No. 8.

The whole quantity specifically leased to be equal to a power to drive one pair of four and a half feet diameter mill stones, which together with the necessary machinery will be capable of manufact-

uring one hundred bushels of wheat into superfine flour in twenty-four hours. Six such powers at seven locks, which include this Lock No. 8. The rent to be paid is mentioned.

The State reserves the right to resume at any time the use of the water hereby leased, whenever the same shall become necessary for the purpose of navigation, and to continue the use thereof so long as the same shall be necessary for the purpose aforesaid.

It is further agreed the Lessee on paying capital on the sum of which the rents herein stipulated is the legal interest, the Lessee shall receive a deed of conveyance absolute of the property leased, reserving however the right of resuming the water as herein before specified.

These are the substantial provisions of the contract of lease.

CLAIM OF CITY UNDER ACT OF MARCH, 1863.

The city claim to have acted and now defend this suit under the act of 24th of March, 1863, which reads as follows:

AN ACT

To authorize the city of Cincinnati to enter upon and occupy a part of the Miami and Erie canal as a public highway and for sewerage purposes.

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio.* That authority and permission shall be granted, in the manner hereinafter pointed out, to the city of Cincinnati to enter upon, improve, and occupy forever, as a public highway and for sewerage purposes, all or any of that part of the Miami and Erie canal which extends from the east side of Broadway, in said city, to the Ohio river, including the width thereof, as owned and held

by the State; but the said grant shall be made subject to all outstanding rights or claims, if any, with which it may conflict; *Provided*, That no work shall be done by said city authorities on the premises hereby granted until the plan of improvement shall be approved of by the Board of Public Works.

SEC. 2. The said grant shall not extend to the revenues derived from the water privileges in said canal, which are hereby expressly reserved; and the said grant shall be made upon the further condition that the said city, in the use as aforesaid of all or any of said portion of said canal, shall not obstruct the flow of water through said canal, nor destroy nor injure the present supply of said water for milling purposes, and that said city shall be liable for all damages that may accrue from such obstruction or injury; but it is not intended hereby to relieve the lessees of said canal, or their assignees, from any responsibilities imposed upon them by "an act to provide for leasing the public works of the State," passed May 8, 1861, or by the instrument of lease executed in pursuance of said act, except as and to the extent that they may be interfered with, as said city may, from time to time, enter upon, improve, and occupy any part of said grant.

SEC. 3. Whenever the Council of said city, by a vote of not less than two-thirds of the whole number of members, thereof, shall decide to use said canal as herein authorized, the said council shall make known its decision to the Governor, and thereupon the Governor, in behalf of the state, shall execute and deliver to the city of Cincinnati a grant of the part of said canal herein described for the uses and purposes before mentioned, and upon the terms and conditions specified in this act. The attorney general shall prepare the form of said grant.

SEC. 4. This act shall not be construed to confer upon said city any new power of taxation, or to borrow money, or to contract debts in the use as aforesaid of said canal.

SEC. 5. This act shall take effect from and after its passage.

JAMES R. HUBBELL.
Speaker of the House of Representatives.

B. STANTON,
President of the Senate.

March 24, 1863.

And that under that act the city has the power to destroy all the water powers on the canal in order to build up Eggleston Avenue, without being accountable for any loss or injury sustained by Fox, the plaintiff. They claim the Legislature had the power to destroy this water power, that this law has destroyed it, and those who owned the water power, and the buildings and machinery, have no claim upon either the State or the city for the damage done.

The Supreme Court of Ohio, at its December term, on the writ of error taken to that Court, by Fox, decided as follows: And the Court, on motion of the plaintiff in error, ordered it to be certified and made part of the record in this case, and of the above judgment and entry affirmance, that the plaintiff claimed to recover in this action damages of the defendant in error for depriving him of the use of surplus water at Lock No. 8, in the city of Cincinnati, which he claimed to own by virtue of the lease from the State of Ohio to Clark Williams, (and assignments thereof to him) dated the 26th day of March, 1836, being paper marked B, and the agreements to reduce the rent, dated 1st November, 1853, being paper marked A in the record.

And the defendant gave in evidence a law passed by the Ohio Legislature, entitled an act authorizing the city of Cincinnati to enter upon and occupy a part of the Miami and Erie canal as a public highway and for sewerage purposes, a copy of which is inserted in the record, and claimed that by virtue of said act, the city of Cincinnati had power so to lay out what is called Eggleston Avenue, as to cut off the supply of water (after being used at Lock No. 7) to Lock No. 8 owned by plaintiff, without liability to plaintiff for any damages occasioned to him by such act. And the Court further ordered it to be certified that said plaintiff in error claimed and asked the Court to hold that said act of the Legislature passed on the 24th March, 1863, is repugnant to articles 5th, 13th, 14th and 15th of amendments to the Constitution of the United States, and are void so far as they authorized the city to injure or destroy, or make less valuable the said water power of the plaintiff, *without making compensation for such injury.* But this Court ordered and adjudged that the said act was not repugnant to articles 5th, 13th, 14th and 15th amendments to the Constitution of the United States, and thereupon affirmed the judgment.

And it is further ordered by the Court to be certified, that the question of the validity of said act of the General Assembly, of the State of Ohio, passed 24th of March, 1863, in the particulars mentioned, was drawn in question on hearing and decision of said case, as being repugnant to the above mentioned articles of amendments to the Constitution of the United States, and that the decision of this Court was in favor of the validity of said act.

The evidence clearly shows that the city, in conjunction with the Canal Commissioners, agreed not to take the water from Lock No. 7 to Lock No. 8.

And the city entered into a contract with the Miami Machine Works, obligating the city to run the water from Lock No. 7 into the sewer before it reached Lock No. 8, so that the whole Fox power at Lock No. 8 was destroyed, which was worth from $20,000 to $60,000. See the testimony of Wirth and plan of disposing of the water into sewer. Page 8, 9 and 10.

The Court will perceive that the only question for this Court to decide is whether the judgment of the Supreme Court of Ohio, deciding that the act of 24th of March, 1863, destroying the water power at Lock No. 8, without making any provision for compensation for the injury done is valid.

And in order to ascertain what the rights of Fox are, we must resort to the lease from the State of Ohio to Clark Williams.

That the State had the right to lease the surplus water passing the different locks is settled: 1st. By granting the lease. 2nd, By the case of

Buckingham vs. Smith, 10th Ohio Reports, 295.
Taylor on Landlord and Tenant. Sec. 17, page 10.
Varick vs. Smith. 9 Paige cha. 552.

This lease is a contract between the State and the lessee, and is to be interpreted, as a contract.

Fletcher vs. Peck. 6 Cranch, 87.
Town of Paulet vs. Clark. 9 Cranch, 292.
Binghampton Bridge Case. 3 Wallace, 51, 267.

And the same construction must be given to a grant by the State, as would be given to a contract between individuals.

Varick vs. Smith. 9 Paige, 552.

Wilmington R. R vs. Reed. 3 Wallace, 267.
Binghampton Bridge. 3 Wallace. 51.

The grantor in a lease may insert any conditions in the grant, which are not illegal. The conditions are his own, and if assented to by both parties, both are bound.

Taylor's Land and Tenant. Section 280.
2d Platton Leases. 40, 326.

But the conditions must be annexed at the time of creating the estate.

Taylor's Land and Tenant. Sec. 280

The lease is made in conformity with the statue of 1830, the 6th Section of which reads as follows:

SECTION 6. That every lease, grant or conveyance shall contain a reservation and condition, that the State or its authorized agents may at any time resume the privilege or right to use the use of water or any portion thereof, whenever it may be *deemed necessary for the purposes of navigation*, or whenever its use for Hydraulic purposes shall be found in any manner to interfere with, and injuriously effect the navigation of either of the canals, feeders or streams from which the water shall be taken for such Hydraulic purposes, when the privilege is resumed the sum paid or rent returned agreeable to the lease to be refunded.

This being the only reservation reserved by the State, can not be extended by any new Legislation.

The right of the State to resume the water when *necessary for the purpose of navigation*, being a condition subsequent must be strictly construed, and being confined to that necessity, can only extend to the necessity provided for. It is to be construed in the

same manner as the right of the State is confined to the use of land or extend to the necessity provided for. It is to be construed in the water *necessary for the public or canal use*; and it is well settled that where only a part of a stream is *necessary for the use of the Canal*, the owner is not to be deprived of the balance of the stream, for as to so much as is not *necessary for the Canal*, the original owner is entitled to the use, and can not be deprived of it by the State, or its agents, or canal commissioners.

In order to ascertain the true meaning of this lease, we must examine the conditions inserted in the Lease, which as we suppose informs us as to what the rights of the parties are under the contract. And these conditions are to be interpreted fairly to carry out the actual intentions of the parties.

The object of the Legislature in authorizing these leases to be made, was to secure a revenue to the State from the surplus water, and to do this it was *imprudent* to insert conditions which would enable the State arbitrarily to destroy the power, as was done in the New York leases, which the Legislature of Ohio was aware of but did not adopt. To induce men to expend large amounts of money in building mills and factories, it was supposed necessary to have some reasonable assurance that the water power should be continued, and at the same time it was necessary that the State should have the privilege of resuming the surplus, if *necessary to preserve the navigation*; and the form of the lease was agreed to as per copy, and by it the parties must now be bound, and not by the New York leases. And in order to ascertain the true meaning of this contract we must notice the conditions inserted in, and forming a part of the contract.

This Lease grants all the *surplus water* which may at any time

pass the said Locks, and which will not be *requisite to pass boats* and other floats through the locks. The whole quantity specifically leased, is to be equal to a power to drive six run of one pair of four and a half feet diameter mill stones, which with the necessary machinery, will be capable of manufacturing one hundred bushels of wheat, by each run, into superfine flour in twenty-four hours. But *all the surplus water is leased*, and sufficient to drive six run of stones The Lesseé to pay a rent at the different locks which is stipulated.

The Lessee is not to be deprived of the use of the water for more than one month in the year, if more than one month is required for repairs, an allowance is to be made from the rent, not necessary here to be noticed.

The Lease contains the following reservation, which the Court must also construe ; "And the party of the first part reserves the "right to resume at any time the use of the water hereby leased, "*whenever the same shall become necessary for the purpose of navigation*, "and to continue the use thereof so long as the same shall be "*necessary for the purpose aforesaid.* And if it shall become *necessary* "for the party of the first part to resume the use of so great a "portion of water hereby leased, or the whole thereof for so "great a portion of the water hereby leased, or the whole thereof "for so great a portion of the time, so as to defeat the object of this "lease by destroying the value of the privilege, which fact shall be "determined by three judicious disinterested freeholders, one to be "chosen by the acting commissioner, or other authorized agent of "the State, one by the party of the second part, and the third by "the two thus chosen, then the party of the second part shall be "from such time absolved from all further liabilities growing out of

"this agreement.

This right to resume depends upon the question whether the surplus water has become *necessary for the purpose of navigation.* If the Lease had been by an individual no one can doubt but that such would be its construction, we claim that neither under the language of this lease, nor under the language of the 6th Section of the act of 18 February, 1830, in 3 Chase's Statue, page 1659, in force when this lease was made, has the State the right to destroy these water privileges *arbitrarily.* The language of the act and of the lease is, the State *may* resume the privilege whenever it may deem it *necessary for the purposes of navigation.*

We claim the State must depend upon the rights secured by the lease. It cannot annex any *additional condition* to the performance of a contract not provided for in the original contract.

Browns Water Furnace Co. vs. French, 34 *Howard* (*N. Y.*) 94.

The State having once made a grant she cannot by Legislation repudiate that grant, nor by making a new grant, the grant being a contract executed, she cannot effect the grant in any way directly or indirectly.

Fletcher vs. Peck, Cond. Rep. 321, (6 Cranch 87.)
Town of Pawlet vs. Clark, 9 Cranch, 292. (3 Cond. 422.)
Dartmouth College vs. Woodward, 4 Whea. 58, (4 Cond. 558.)
Gardner vs. Trustees of Newburgh, (2 John Cha. 161.)

The State of Ohio independent of the clause reserving the right to resume for the causes mentioned in the lease, might condemn the water power, or the land necessary for public purposes, but such act must contain a provision for compensating the owner, and must be for public purposes; where no such provision is made the law is unconstitutional. It has been said that if a provision was

made declaring no compensation should be made, such provision is unconstitutional.

Ten Eych vs. Delaware & Rariton Canal, 3 Har., N. J., 203.
Tinsmore vs. Belvidere Delaware R. R. 2 Dutcher, 166.
Sinnicklin vs. Johnson, 2 Harrison, 144.
2 *Parsons on Contract*, 683.

And we claim the State has only reserved a right to *resume* the privileges granted by the lease when *necessary for the purposes mentioned*, she cannot resume for any other purpose than *navigation*.

The State therefore had *no right* to resume the water power, because it is not pretended it was resumed for the purposes of *navigation*, and so is not provided for by the lease.

Could the State under this clause have resumed for the purpose of making a lease to another party at a higher rent?

If they could raise the rent one dollar, they might raise it $1.000 per year, and thus destroy the power.

We claim the State of Ohio, by the lease to Clark Williams, dated 26th of March, 1836, leased to him all the surplus water of the Canal in Cincinnati, as stated in the lease. The surplus water leading from Lock No. 7 to Lock No. 8, by assignment, has become vested in Fox, the plaintiff.

That such a lease when executed becomes a contract is settled in Ohio, in the case of

Buckingham et al vs. Smith & Dille, 10th Ohio Reports, 295.

A contract made by a Legislature is obligatory in the Legislature.

Fletcher vs. Peck, 2 Cond. Rep. 323, 6 Cranch, 87.

Town of Pawlet vs. Clark et al. 9 Cranch, 292

"One of the tests that a contract has been impaired is, that its "value has by legislation been diminished. It is not by the "contract to be impaired at all."

Planters Bank, 6 Howard, 327.
Van Hoffman vs. City of Quincy, 4 Wallace, 553.

"If a remedy is taken away entirely, or clogged by conditions of "any kind, the right of the owner may subsist, but it is impaired." 6 Howard, 330.

"When a contract is made it can no more be impaired, than the "contract between the maker and the payer of the note"6 Howard 335.

State of New Jersey, 7 Cranch, 164.
Town of Pawlet vs. Clark, 9 Cranch 292.

A law of Illinois requiring real estate to be sold for not less than two-thirds of its appraised value declared unconstitutional.

If any subsequent law impairs the right it necessarily bears upon the obligation of the contract.

McCracken vs. Hayward, 2 Howard, 612.

A law providing for exempting property from being levied upon by execution is unconstitutional as to debts contracted previous to the passage of the law.

Gunn vs. Barrey, 15 Wallace, 622.

The Court will perceive that the Supreme Court in affirming the judgment of the Court below, did not consider any of the numerous questions printed in the Record, except the validity of the act establishing Eggleston Avenue.

The same Court had decided in the case of

Hubbard vs. The City of Toledo, 21 Ohio State Rep. 379.

That the lease granted under the act of 23d March, 1840—Swan's Revised Statutes, 144—did not prevent the Legislature from passing the act to authorize the City of Toledo, to enter upon and occupy a part of the Miami and Erie Canal as a public highway, and for sewerage and water purposes, and that although by the passage of the act it deprived the plaintiff of the use of the water, he had no right to sue the City of Toledo or the State of Ohio, for damages sustained by the destruction.

The Court in that case held:

First, That the aqueduct was a nuisance, and had properly been abated by due process of law. The Court might have stopped here.

Second, That the Canal was abandoned by the act and the canal vacated.

Third. That the clause "shall be subject to all outstanding claims "and rights, if any, with which it may conflict, and that the City "shall be liable for all damages which may accrue from the vacation "of said Canal, was confined to a legal claim against the State, and "that no claim could be sustained by Hubbard vs. The City of "Toledo, for the wrong done to Hubbard."

And the Court considering the Toledo case and this case to be like each other, affirmed the judgment upon that single question. The Court considered that although "their lease had not expired, the instrument or lease was a mere *license* to the Lessees to take, not an obligation on the part of the State to furnish.

In all this the Court erred. The contract is a lease by express terms, so worded in the lease to Williams, authorized by the State to be made as such.

So that the Lease is *not* merely a license; and though a mere license is revocable. That which is called a license is often something more than a license, it is often connected with a grant, and then the party who has given it, cannot in general revoke it so as to defeat his grant, to which it is incident.

Babcock vs. Utter, 1 Keyes (38 New York) 404.

A lease must be in writing, a license may be by word.

Taylor's Landlord and Tenant, Sec. 31.

The whole language of the lease shows that the parties intended it as a lease, and not as a license.

There is a difference between License, Grant, Easement and Estate.

4. *W. S. M.* 260.

Where the parties intended a Lease and not a License, the doctrine applicable to a License is not to be allowed.

The Court, also in that case, held that no recovery could be had by Hubbard vs. The City of Toledo, under the term of outstanding rights and claims. This provision only meant claims existing against the State, and only covered claims against the State by the Lessees of the public works, under the act of 8th of May, 1861, holding the State had no authority to pass an act affecting their interest as Lessees.

The Court intimated in that case, page 399, that it would have

been a violation of the contract, made by the State with the Lessees of the canals, under the act of 8th of May, 1861—Vol. 53, Ohio Statutes, pa. 147—unless the Lessees should waive their rights, as they could *not be divested* by the State, without impairing the obligations of their contract.

We are of the same opinion, but if the Court will look at the Lease to Williams, and the Lease transferring the Canals to the Lessees, they will find them both to be genuine *contracts*. The Contract, by the State to Williams, is equally protected by the constitution from repeal or destruction, as the Contract of the State with Lessees of the Canals.

We claim a fair construction of the Lease to Williams, and his assignees, shows he was as much entitled to protection as the Lessees of the public works was, the operation of the act of 1863, authorizing Eggleston Alley as construed by the Court and the City of Cincinnati, was as much a violation of contract, as the Toledo act could be to the Lessees of the public works.

T. D. LINCOLN,
Attorney for Plaintiff in Error.